TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 687. 251.

I. STANTON CARTER (ON BEHALF OF OBERLIN M. CARTER), APPELLANT,

vs.

ROBERT W. McCLAUGHRY, WARDEN OF THE UNITED STATES PENITENTIARY AT FORT LEAVENWORTH, KANSAS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

FILED FEBRUARY 14, 1901.

(18,052.)

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OCTOBER TERM, 1900.

No. 567.

I. STANTON CARTER (ON BEHALF OF OBERLIN M. CARTER), APPELLANT,

vs.

ROBERT W. McCLAUGHRY, WARDEN OF THE UNITED STATES PENITENTIARY AT FORT LEAVENWORTH, KANSAS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

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1 THE UNITED STATES OF AMERICA, *ss:*

To Robert W. McClaughry:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, now being holden at Washington, D. C., within 30 days from the service upon you of this citation, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the district of Kansas, wherein I. Stanton Carter is appel-ant and Robert W. McClaughry is the respondent, to show cause, if any there be, why the order and judgment in said bill named should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 24th day of December, 1900.

WILLIAM C. HOOK,
District Judge.

Service acknowledged this 28th day of Dec., 1900.

I. E. LAMBERT,
U. S. District Att'y, Representing Robert W. McClaughry.

1½ [Endorsed:] No. 7849. Oberlin M. Carter, on the petition of I. Stanton Carter, petitioner, *vs.* Robert W. McClaughry. Citation. Filed Dec. 24, 1900. Geo. F. Sharitt, clerk.

2 In the Circuit Court of the United States, District of Kansas, Fist Division, Sitting at Leavenworth.

OBERLIN M. CARTER, on the Petition of I. Stanton Carter, Petitioner, *vs.* ROBERT W. MCCLAUGHRY.	Application for a Writ of *Habeas Corpus.*

To the honorable the circuit judges of the United States in the eighth judicial circuit sitting:

Your petitioner, I. Stanton Carter, respectfully shows unto your honors that he is the brother of Oberlin M. Carter, who, prior to the 29th day of September, A. D. 1899, was a captain in the Corps of Engineers of the United States Army, and who is now imprisoned and restrained of his liberty by one Robert W. McClaughry, the warden of the United States prison at Fort Leavenworth, Kansas; and that the place of said confinement is in said prison at said Fort Leavenworth.

Your petitioner further shows that said Carter is imprisoned and restrained by virtue of a sentence imposed upon him by a general court-martial of the United States, convened by the President of the United States, at Savannah, Georgia, which said sentence is as follows:

"And the court does therefore sentence the accused Captain Oberlin M. Carter, Corps of Engineers, United States Army, to be dismissed

from the service of the United States, to suffer a fine of $5,000, to be confined at hard labor at such place as the proper authority may direct for five years, and the crime, punishment, name and place of abode of the accused to be published in the newspapers in and about the station and the State from which the accused came or where he usually resides."

That said sentence was approved by the Secretary of War and approved and confirmed by the President of the United States on the 29th day of September, 1899.

That the warrant or mittimus under which the said McClaughry detains the said Carter, as aforesaid, is the following order from the headquarters of the army, that is to say:

3 *General Orders No.* 172.

HEADQUARTERS OF THE ARMY,
ADJUTANT GENERAL'S OFFICE,
WASHINGTON, D. C., *September* 29, 1899.

Before a general court-martial which convened at Savannah, Georgia, pursuant to special orders No. 282, of December 2, 1877; special orders No. 306, of December 31, 1897, and special orders No. 1, of January 3, 1898, from headquarters of the army, adjutant general's office, and of which Brigadier General Elwell S. Otis, United States Army, was president, and Colonel Thomas F. Barr, assistant judge advocate general, was judge advocate, was arraigned and tried—

Captain Oberlin M. Carter, Corps of Engineers.

Charge I.—"Conspiring to defraud the United States, in violation of the 60th article of war."

Specification I.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, devising and intending to defraud the United States, and to aid the Atlantic Contracting Company, a corporation, and John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Anson M. Bangs, and divers other persons, all of whom were likewise with him, the said Carter, devising and intending to defraud the United States, did, on or about August 1, 1892, and thereafter to June 6, 1896, with the corporation and persons named, unlawfully combine and conspire to defraud the United States of divers large sums of money by aiding the said corporation and persons to obtain the allowance and payment of certain false and fraudulent claims indicated by the payments hereinafter alleged to have been made; and in pursuance of the said conspiracy the said Captain Oberlin M. Carter, in the months of August and September, 1892, being the officer of the United States in local charge of the river and harbor district usually called the Savannah district, and of the improvement by the United States of rivers and harbors in said district, did, with the knowledge and consent of the said other parties named, so advertise for proposals for contracts for certain works of improvement in Cumberland sound, in said district, and so manage and conduct such advertising and the matter of giving out information in regard to the contract to be let, and the matter of

receiving proposals and awarding the contract, as to enable the said Edward H. Gaynor to secure the contract for said work and to have the same entered into by the United States with him, September 16, 1892; and in further pursuance of the said conspiracy
4 the said Edward H. Gaynor afterwards, to wit, from about the 16th day of September, 1892, to the 25th day of May, 1893, did furnish and put into said work certain mattresses, stone and other material which were different in kind and character from the mattresses, stone and other material contracted for in said contract, and very much less costly to the said Edward H. Gaynor, as well as of less value to the United States, which said mattresses, stone and other material so furnished and put into the work the said Captain Carter, in further pursuance of said conspiracy, did receive and accept and cause to be received and accepted for the United States as and for the mattresses, stone and other material contracted for, and did cause payments to be made out of the moneys of the United States to the said Edward H. Gaynor on account of the said furnishing and delivery of the same, and as if the said mattresses, stone and other materials had been such as were stipulated for in the contract, and at the same rate, cost and price as if they had been, as follows, and on or about the dates named: November 17, 1892, $1,713.23; December 16, 1892, $21,102.67; December 31, 1892, $24,529.95; January 5, 1893, $493.59; February 4, 1893, $20,274.07; March 6, 1893, $16,433.14; April 3, 1893, $14,218.86; May 2, 1893, $27,436.06; May 22, 1893, $9,337.85, and May 25, 1893, $26,706.46.

"And in further pursuance of the said conspiracy the said Captain Carter, about August, September and October, 1892, did advertise for proposals for a contract for improving the harbor at Savannah, Georgia, in said river and harbor district, and did so manage and conduct the matter of such advertising and the matter of giving out information in regard to the contract to be let, and the matter of receiving proposals and awarding the contract, as to enable the said The Atlantic Contracting Company to secure the contract for said work and to have the same entered into by the United States with it October 22, 1892; and in further pursuance of the said conspiracy the said The Atlantic Contracting Company, from about the 22d day of October, 1892, to the 4th day of May, 1895, did furnish and put into said work certain mattresses, stone, and other material which were different in kind and character from the mattresses, stone and other material contracted for in said contract and very much less costly to the said The Atlantic Contracting Company as well as of less value to the United States, which said mattresses, stone and other material so furnished and put into the work, the said Captain Carter, in further pursuance of said conspiracy, did receive
5 and accept and cause to be received and accepted for the United States, as for the mattresses, stone and other material contracted for, and did cause payment to be made out of the moneys of the United States, as to the said The Atlantic Contracting Company, on account of the said furnishing and delivery of the same, and as if the said mattresses, stone and other material had been such as were stipulated for in the contract, and at the same rate, cost and

price as if they had been, as follows, and on or about the dates named: November 17, 1892, $3,265.61; December 3, 1892, $15,000; December 16, 1892, $8,507.45; December 31, 1892, $20,000; January 10, 1893, $25,416.81; February 4, 1893, $42,722.83; February 8, 1893, $15.71; March 6, 1893, $44,985.47; March 31, 1893, $38,076.11; April 3, 1893, $20,584.51; May 2, 1893, $30,000; May 31, 1893, $6,105.69; July 3, 1893, $5,968.18; July 3, 1893, $34,177.94; July 3, 1893, $46,592.39; August 3, 1893, $57,013.64; September 1, 1893, $97,159.99; October 2, 1893, $59,554.84; November 3, 1893, $52,452.22; December 1, 1893, $85,752.28; January 2, 1894, $44,175.02; January 5, 1894, $27,057; February 2, 1894, $75,118.71; March 1, 1894, $44,630.22; July 7, 1894, $202,481.40; September 8, 1894, $481,933.67; October 2, 1894, $88,922.63; November 9, 1894, $44,303.92; December 5, 1894, $38,903.72; January 11, 1895, $39,368.67; February 1, 1895, $31,659.28; March 2, 1895, $25,612.62; April 5, 1895, $63,656.50, and May 4, 1895, $19,860.08.

"And in further pursuance of the said conspiracy the said Captain Carter, about January, February and March, 1893, did advertise for proposals for a contract for improving Jekyl creek, Georgia, in said river and harbor district, and did so manage and conduct the matter of such advertising and the matter of giving out information in regard to the contract to be let, and the matter of receiving proposals and awarding the contract, as to enable the said The Atlantic Contracting Company to secure the contract for said work, and to have the same entered into by the United States with it, March 1, 1893; and in further pursuance of said conspiracy the said The Atlantic Contracting Company, from about the 1st day of March, 1893, to about the 3d day of July, 1893, did furnish and put into said work certain mattresses, stone and other material which were different in kind and character from the mattresses, stone and other material contracted for in said contract, and very much less costly to the said

6 The Atlantic Contracting Company as well as of less value to the United States; which said mattresses, stone, and other material so furnished and put into the work the said Captain Carter, in further pursuance of the conspiracy, did receive and accept, and cause to be received and accepted, for the United States and as and for the mattresses, stone, and other material contracted for, and did cause payments to be made out of the moneys of the United States to the said Atlantic Contracting Company on account of said furnishing and delivering of the same, and as if the said mattresses, stone, and other material had been such as were stipulated for in the contract, and at the same rate, cost, and price as if they had been, as follows, and on or about the dates named: June 3, 1893, $3,309.40; July 3, 1893, $3,595.38, and July 3, 1893, $14,591.00.

"And in further pursuance of the said conspiracy the said Captain Carter, about August, September, October and November, 1894, did advertise for proposals for improving Cumberland sound, in said river and harbor district, and did so manage and conduct the matter of such advertising and the matter of giving out information in regard to the contract to be let, and the matter of receiving proposals and awarding the contract, as to enable the said Anson M. Bangs to

secure the contract for said work and to have the same entered into by the United States with him, November 15, 1894; and in further pursuance of the said conspiracy the said Anson M. Bangs, from about the 15th day of November, 1894, to about the 4th day of May, 1895, did furnish and put into said work certain mattresses, stone, and other material which were different in kind and character from the mattresses, stone and other material contracted for in said contract, and very much less costly to the said Anson M. Bangs, as well as of less value to the United States; which said mattresses, stone, and other material so furnished and put into the work, the said Captain Carter, in further pursuance of the conspiracy, did receive and accept, and cause to be received and accepted for the United States as and for the mattresses, stone, and other material contracted for; and did cause payments to be made out of the moneys of the United States to the said Anson M. Bangs, on account of said furnishing and delivery of the same, and as if the said mattresses, stone and other material had been such as were stipulated for in the contract, and at the same rate, cost and price as if they had been, as follows, and on or about the dates named: December 5, 1894, $874.73; January 11, 1895, $9,845.35; February 1, 1895, $17,800.50; March 2, 1895, $21,287.65; April 5, 1895, $29,659.82, and May 4, 1895, $32,059.92.

"And in further pursuance of the said conspiracy the said
7 Captain Carter, about March and April, 1895, did advertise for proposals for improving Altamaha river, Georgia; Darien harbor, Georgia; Jekyl creek, Georgia, and inside water route between Savannah, Georgia, and Ferdinanda, Florida, in said river and harbor district, and did so manage and conduct the matter of such advertising and the matter of giving out information in regard to the contract to be let and the matter of receiving proposals and awarding the contract as to enable the said William T. Gaynor to secure the contract for said work and to have the same entered into by the United States with him April 20th, 1895, and in further pursuance of said conspiracy the said William T. Gaynor, from about the 20th day of April, 1895, to about the 1st day of July, 1895, did furnish and put into said work certain mattresses, stone, and other material which were different in kind and character from the mattresses, stone, and other material contracted for in said contract, and very much less costly to the said William T. Gaynor, as well as of less value to the United States; which said mattresses, stone, and other material so furnished and put into the work, the said Captain Carter, in further pursuance of the conspiracy, did receive and accept, and cause to be received and accepted for the United States as and for the mattresses, stone and other material contracted for; and did cause payments to be made out of the moneys *to* the United States to the said William T. Gaynor on account of said furnishing and delivery of the same, and as if the said mattresses, stone, and other material had been such as were stipulated for in the contract, and at the same rate, cost, and price as if they had been, as follows, and on or about the dates named: June 4, 1895, $17,728.81, and July 1, 1895, $27,861.32."

Specification II.—"In that Captain Oberlin M. Carter, Corps of En-

gineers, United States Army, devising and intending to defraud the United States and to aid the Atlantic Contracting Company, a corporation, and John F. Gaynor, William T. Gaynor, and Edward H. Gaynor, and Anson M. Bangs, and divers other persons, all of whom were likewise with him, the said Carter, devising and intending to defraud the United States, did, with the corporation and persons named, unlawfully combine and conspire to defraud the United States of divers large sums of money by aiding the said The Atlantic Contracting Company to obtain the allowance and payment of certain false and fraudulent claims hereinafter described; and in

8 pursuance of the said conspiracy the said Oberlin M. Carter, in the months of June, July, and August, September and October, 1896, being an officer of the United States in charge of the river and harbor district usually called the Savannah district, and of the improvement by the United States of rivers and harbors in said district, did, with the knowledge and consent of the said other parties named, so advertise for proposals for contracts for certain works of improvement in the harbor of Savannah, Georgia, in said district, and so manage and conduct said advertising, and the matter of giving out information in regard to the contract to be let, and the matter of receiving proposals and awarding the contract, as to enable the said The Atlantic Contracting Company to secure the contract for said work, and to have the same entered into by the United States with it October 8, 1896; and in further pursuance of the said conspiracy the said The Atlantic Contracting Company afterwards, to wit, from about the 8th day of October, 1896, to July 31, 1897, did furnish and put into said work certain mattresses, stone and other material which were different in kind and character from the mattresses, stone and other material contracted for in said contract, and very much less costly to the said The Atlantic Contracting Company as well as of less value to the United States; which said mattresses, stone, and other material so furnished and put into the work the said Captain Carter, in further pursuance of said conspiracy, did receive and accept, and cause to be received and accepted, for the United States, as and for the mattresses, stone, and other material contracted for; and did, on or about July 6, 1897, cause to be paid, out of the moneys of the United States, $230,749.90 to the said The Atlantic Contracting Company on account of the said furnishing and delivery of the same, and as if the said mattresses, stone and other material had been such as were stipulated for in the contract, and at the same rate, cost and price as if they had been.

And in further pursuance of the said conspiracy the said Captain Carter, about June, July, August, September and October, 1896, did advertise for proposals for a contract for improving Cumberland sound, Georgia, in said river and harbor district, and so manage and conduct the matter of such advertising, and the matter of giving out information in regard to the contract to be let, and the matter of receiving proposals and awarding the contract, as to enable the said The Atlantic Contracting Company to secure the contract for said work and to have the same entered into by the United States with it October 8, 1896; and in further pursuance of the said

conspiracy the said The Atlantic Contracting Company, from
9 about the 8th day of October, 1896, to the 31st day of July, 1897, did furnish and put into said work certain mattresses, stone and other material which were different in kind and character from the mattresses, stone, and other materials contracted for in said contract, and very much less costly to the said The Atlantic Contracting Company, as well as of less value to the United States; which said mattresses, stone, and other material so furnished and put into the work the said Captain Carter, in further pursuance of said conspiracy, did receive and accept, and cause to be received and accepted, for the United States, as and for the mattresses, stone, and other material contracted for; and did, on or about July 6th, 1897, cause to be paid, out of the moneys of the United States, $345,000.00 to the said The Atlantic Contracting Company, on account of said furnishing and delivery of the same, and as if the said mattresses, stone, and other material had been such as were stipulated for in the contract and at the same rate, cost, and price as if they had been.

"This on the 6th day of June, 1896, and thereafter to the 1st day of August, 1897."

Charge II.—"Causing false and fraudulent claims to be made against the United States, in violation of the 60th article of war."

Specification I.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, being at the time the officer in local charge of river and harbor improvements in the Savannah river and harbor districts, did cause to be made certain false and fraudulent claims against the United States and in favor of Edward H. Gaynor, knowing the same to be false and fraudulent, to wit: The claims represented by the following vouchers, submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving Cumberland sound, Georgia and Florida':

Voucher No. 18, for $1,713.23, November, 1892;
Voucher No. 13, for $21,102.67, December, 1892;
Voucher No. 20, for $24,529.95, December, 1892;
Voucher No. 26, for $493.59, January, 1893;
Voucher No. 3, for $20,274.07, February, 1893;
Voucher No. 2, for $16,433.14, March, 1893;
Voucher No. 1, for $14,218.86, April, 1893;
Voucher No. 2, for $27,436.06, May, 1893;
Voucher No. 5, for $9,937.85, May, 1893;
Voucher No. 6, for $26,706.46, May, 1893;

which said false and fraudulent claims the said Captain Carter caused to be made, by knowingly permitting Edward H. Gaynor, who had previously entered into a contract, dated September 16, 1892,
10 to furnish to the United States certain mattresses, stone, and other materials of specified kinds and qualities, for constructing works in said river and harbor district, to furnish and put into said works mattresses, stone, and other material different from, inferior to, cheaper, and of less value to the United States than those contracted for, and by receiving and accepting and paying for the same as of the kinds and qualities contracted for, and by falsely certifying to the correctness of the said vouchers, well knowing that

the mattresses, stone, and other material charged for in said vouchers as having been furnished had not in fact been furnished, each of the said claims having been made in or about the month named in the above description of the voucher relating to it."

Specification II.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, being at the time the officer in local charge of river and harbor improvements in the Savannah river and harbor districts, did cause to be made certain false and fraudulent claims against the United States and in favor of the Atlantic Contracting Company, a corporation, knowing the same to be false and fraudulent, to wit, the claims represented by the following vouchers submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving harbor at Savannah, Georgia':

Voucher No. 11, $3,265.61, November, 1892;
Voucher No. 2, $15,000.00, December, 1892;
Voucher No. 24, $8,507.45, December, 1892;
Voucher No. 28, $20,000.00, December, 1892;
Voucher No. 3, $25,416.81, January, 1893;
Voucher No. 1, $42,722.83, February, 1893;
Voucher No. 3, $15.71, February, 1893;
Voucher No. 2, $44,985.47, March, 1893;
Voucher No. 8, $38,076.11, March, 1893;
Voucher No. 2, $20,584.51, April, 1893;
Voucher No. 4, $30,000.00, May, 1893;
Voucher No. 28, $6,105.69, May, 1893;
Voucher No. 3, $5,968.18, July, 1893;
Voucher No. 4, $34,177.94, July, 1893;
Voucher No. 5, $46,592.39, July, 1893;
Voucher No. 2, $57,013.64, August, 1893;
Voucher No. 1, $97,159.99, September, 1893;
Voucher No. 1, $59,554.84, October, 1893;
Voucher No. 1, $52,452.22, November, 1893;
Voucher No. 2, $85,752.28, December, 1893;
Voucher No. 1, $44,175.02, January, 1894;
Voucher No. 2, $27,057.00, January, 1894;
Voucher No. 4, $75,118.71, February, 1894;
Voucher No. 6, $44,630.22, March, 1894;
11 Voucher No. 7, $202,481.40, July, 1894;
Voucher No. 10, $481,933.67, September, 1894;
Voucher No. 7, $88,922.63, October, 1894;
Voucher No. 48, $44,303.92, November, 1894;
Voucher No. 11, $38,903.72, December, 1894;
Voucher No. 41, $39,368.67, January, 1895;
Voucher No. 7, $31,659.28, February, 1895;
Voucher No. 10, $25,612.62, March, 1895;
Voucher No. 30, $63,656.50, April, 1895;
Voucher No. 22, $19,860.08, May, 1895;

which said false and fraudulent claims the said Captain Carter caused to be made by knowingly permitting the said Atlantic Contracting Company, which had previously entered into a contract

dated October 2, 1892, to furnish the United States certain mattresses, stone and other material of specified kinds and qualities for constructing works in said river and harbor district, to furnish and put into said works mattresses, stone, and other material different from, inferior to, cheaper, and of less value to the United States than those contracted for; and by receiving and accepting and paying for the same as of the kinds and qualities contracted for, and by falsely certifying to the correctness of the said vouchers, well knowing that the mattresses, stone, and other material charged for in said vouchers as having been furnished had not in fact been furnished; each of the said claims having been made in or about the month named in above description of the voucher relating to it."

Specification III.—"In that Oberlin M. Carter, Corps of Engineers, United States Army, being at the time the officer in local charge of river and harbor improvements in the Savannah river and harbor district, did cause to be made certain false and fraudulent claims against the United States and in favor of the Atlantic Contracting Company, a corporation, knowing the same to be false and fraudulent, to wit: Claims represented by the following vouchers submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving Jekyl creek, Georgia':

Voucher No. 2, $3,309.40, June, 1893;

Voucher No. 1, $3,595.38, July, 1893;

and by following voucher, submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving waterway between Savannah, Georgia, and Ferdinanda, Florida. Applied to that work at Jekyl creek, Georgia':

Voucher No. 1, $14,591.00, July, 1893;

which said false and fraudulent claims the said Captain
12 Carter caused to be made, by knowingly permitting the said Atlantic Contracting Company, which had previously entered into a contract dated March 1, 1893, to furnish the United States certain mattresses, stone and other material of specified kinds and qualities for constructing works in said river and harbor district, to furnish and put into said works mattresses, stone and other material different from, inferior to, cheaper, and of less value to the United States than those contracted for; and by receiving and accepting and paying for the same as of the kinds and qualities contracted for, and by falsely certifying to the correctness of the said vouchers, well knowing that the mattresses, stone and other material charged for in said vouchers as having been furnished had not in fact been furnished; each of the said claims having been made in or about the month named in the above description of the voucher relating to it."

Specification IV.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, being at the time the officer in local charge of river and harbor improvements in the Savannah river and harbor district, did cause to be made certain false and fraudulent claims against the United States and in favor of Anson M. Bangs, knowing the same to be false and fraudulent, to wit: The claims represented by the following vouchers submitted by the said Captain

Carter with his accounts, and marked 'Appropriation for improving Cumberland sound, Georgia':

Voucher No. 13, $874.73, December, 1894;
Voucher No. 42, $9,845.35, January, 1895;
Voucher No. 8, $17,800.50, February, 1895;

and by the following vouchers submitted by the said Captain Carter with his accounts, and marked 'Appropriation for improving Cumberland sound, Georgia and Florida':

Voucher No. 9, $21,287.65, March, 1895;
Voucher No. 29, $29,659.82, April, 1895;
Voucher No. 23, $32,059.92, May 1895;

which said false and fraudulent claims the said Captain Carter caused to be made by knowingly permitting the said Anson M. Bangs, who had previously entered into a contract, dated November 15, 1894, to furnish the United States certain mattresses, stone and other material, of specified kinds and qualities, for constructing works in said river and harbor district, to furnish and put into said work mattresses, stone and other material, different from, inferior *of*, cheaper, and of less value to the United States than those contracted for; and by receiving and accepting and paying for the same as of the kinds and qualities contracted for, and by falsely certify-
13 ing to the correctness of the said vouchers, well knowing that the mattresses, stone and other material charged for in said vouchers as having been furnished had not in fact been furnished; each of the said claims having been made in or about the month named in the above description of the voucher relating to it."

Specification V.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, being at the time the officer in local charge of river and harbor improvements in the Savannah river and harbor district, did cause to be made certain false and fraudulent claims against the United States and in favor of William T. Gaynor, knowing the same to be false and fraudulent, to wit: The claims represented by the following voucher submitted by the said Captain Carter with his accounts, and marked 'Appropriation for improving harbor at Darien, Georgia':

Voucher No. 16, $17,728.81, June, 1895;

and by the following voucher submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving harbor at Darien, Georgia; improving Altamaha river, Georgia; improving waterway between Savannah, Georgia, and Ferdinanda, Florida; improving Jeckyl creek, Georgia':

Voucher No. 14, $27,861.32, July, 1895;

which said false and fraudulent claims the said Captain Carter caused to be made, by knowingly permitting William T. Gaynor, who had previously entered into a contract, dated April 20, 1895, to furnish the United States certain mattresses, stone and other materials of specified kinds and qualities, for constructing works in said river and harbor district, to furnish and put into said work mattresses, stone and other material, different from, inferior to, cheaper, and of less value to the United States than those contracted for, and by receiving and accepting and paying for the same as of kinds and

qualities contracted for, and by falsely certifying to the correctness of said vouchers, well knowing that the mattresses, stone and other material charged for in said vouchers as having been furnished had not in fact been furnished; each of the said claims having been made in or about the month named in the above description of the voucher relating to it."

Specification VI.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, being at the time the officer in local charge of river and harbor improvements in the Savannah river and harbor district, did cause to be made certain false and fraudulent claims against the United States and in favor of the Atlantic
14 Contracting Company, a corporation, knowing the same to be false and fraudulent, to wit: The claim represented by the following voucher, submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving harbor at Savannah, Georgia':

Voucher No. 8, $230,749.90, July, 1897;

and the claim represented by the following voucher submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving Cumberland sound, Georgia and Florida':

Voucher No. 9, $345,000.00, July, 1897;

which said false and fraudulent claims the said Captain Carter caused to be made by knowingly permitting the said Atlantic Contracting Company, which had previously entered into contracts, dated October 8, 1896, to furnish the United States certain mattresses, stone and other material, of specified kinds and qualities, for constructing works in said river and harbor district, to furnish and put into said works, mattresses, stone and other material different from, inferior to, cheaper and of less value to the United States than those contracted for; and by receiving and accepting and paying for the same as of the kinds and qualities contracted for, and by falsely certifying to the correctness of the said vouchers, well knowing that the mattresses, stone and other material charged for in said vouchers as having been furnished, had not in fact been furnished; each of the said claims having been made in or about the month named in the above description of the voucher relating to it."

Specification VII.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, being the engineer officer in local charge of the works of the river and harbor improvement in the Savannah district, did cause to be prepared a pay-roll, the same being voucher No. 30, to his account with the United States for the month of December, 1896, appropriation for improving the harbor at Savannah, Georgia, upon which voucher the said Carter did cause to be entered the names of certain persons hereinafter named, as laborers, and did cause to be presented to him, the said Captain Carter, for payment, and did cause to be paid to the said persons according to said voucher, knowing the same to be false and fraudulent, for services as laborers during the month of December, 1896, the following amounts, to wit: To William Naylor the sum of one dollar ($1.00); to H. Roberts the sum of four dollars ($4.00); to D. A. Holland the sum of four dollars and fifty cents ($4.50); to

S. G. Vinson the sum of twelve dollars and twenty-five cents
15 ($12.25); to P. H. Cotton the sum of six dollars and fifty cents ($6.50); to J. D. Robinson, Jr., the sum of fifty cents ($0.50); the claims for such services being false and fraudulent in that none of the said persons had rendered services as laborers as set forth in said voucher; and he, the said Carter, well knowing that such claims were false and fraudulent.

"This at Savannah, Georgia, on or about December 21, 1896."

Specification VIII.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, being the engineer officer in local charge of the works of river and harbor improvements of the Savannah district, did cause to be entered on voucher No. 5 of his account with the United States for the month of January, 1897, appropriation for improving harbor at Savannah, Georgia, among other things, an account against the United States for the construction by the Atlantic Contracting Company, during the month of December, 1896, of seventy-six (76) linear feet of piling in repairing the Garden Bank training wall near Savannah, Georgia, at $1.60 per linear foot, amounting to $121.60, and did cause to be presented to him, the said Captain Carter, for payment, and did cause to be paid to the said Atlantic Contracting Company, according to said voucher, a claim against the United States in the sum of one hundred and twenty-one dollars and sixty cents ($121.60), the said claim being false and fraudulent, in that only forty-eight (48) linear feet of the piling charged in said account *was* actually constructed, and the service actually rendered as to the other twenty-eight (28) feet charged for was not the construction of piling in repairing said training wall, but was the driving of seven (7) guide-piles for sinking mattresses, the said guide-piles having been driven by the said Atlantic Contracting Company for itself and its sole use and convenience in sinking said mattresses; and he, the said Captain Carter, well knowing that said claim was false and fraudulent.

"This at Savannah, Georgia, on or about January 12, 1897."

Specification IX.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, being the engineer officer in local charge of the works of river and harbor improvement of the Savannah district, did cause to be entered on voucher No. 27 to his account with the United States for the month of March, 1897, appropriation for improving harbor at Savannah, Georgia, on account against the United States for the construction by the Atlantic
16 Contracting Company during the month of February, 1897, of two hundred and forty (240) linear feet of pile-work in repairing training walls near Savannah, Georgia, at $1.60 per linear foot, amounting to $384, and did cause to be presented to him, the said Captain Carter, for payment, and did cause to be paid to the said Atlantic Contracting Company, according to said voucher, a claim against the United States in the sum of three hundred and eighty-four dollars ($384.00); the said claim being false and fraudulent, in that the service actually rendered was not the construction of two hundred and forty (240) linear feet of pile-work in repairing said training walls, but was the driving of sixty guide-piles for sink-

ing mattresses, the said guide-piles having been driven by said Atlantic Contracting Company for itself and its sole use and convenience in sinking said mattresses, and he, the said Captain Carter, well knowing that said claim was false and fraudulent.

"This at Savannah, Georgia, on or about the tenth day of March, 1897."

Specification X.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, being the engineer officer in local charge of the works of river and harbor improvement of the Savannah district, did cause to be entered on voucher No. 21 to his account with the United States for the month of June, 1897, appropriation for improving harbor at Savannah, Georgia, on account against the United States for the construction by the Atlantic Contracting Company, during the month of May, 1897, of sixty-eight (68) linear feet of pile dams in repairing training walls and spur dams near Savannah, Georgia, at $1.60 per linear foot, amounting to $108.80, and did cause to be presented to him, the said Captain Carter, for payment, and did cause to be paid to the said Atlantic Contracting Company, according to said voucher, a claim against the United States in the sum of one hundred and eight dollars and eighty cents ($108.80); the said claim being false and fraudulent in that the service actually rendered was not the construction of sixty-eight (68) linear feet of pile dams in repairing said training walls and spur dams, but was the driving of seventeen (17) guide-piles for sinking mattresses; the said guide-piles having been driven by said Atlantic Contracting Company for itself and its sole use and convenience in sinking said mattresses; and he, the said Captain Carter, well knowing that said claim was false and fraudulent.

"This at Savannah, Georgia, on or about the nineteenth day of July, 1897.

17 Charge III.—"Conduct unbecoming an officer and a gentleman, in violation of the 61st article of war."

Specification I.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, being the officer in local charge for the United States of river and harbor improvements in the Savannah river and harbor district, did wilfully and knowingly cause the following amounts to be paid, out of the moneys of the United States subject to his order and control as such officer in charge of said improvements, the accounts on which the same were paid being false, the amounts paid not being due or owing from the United States to the parties paid or to any one, and he, the said Captain Carter, well knowing this to be the case; the said accounts, the amounts paid, and the payments being those designated by the following vouchers (and the entries therein and endorsements thereon) submitted by the said Captain Carter with his accounts, and marked 'Appropriation for improving Cumberland sound, Georgia and Florida:'

Voucher No. 18, $1,713.23, November, 1892;
Voucher No. 13, $21,102.67, December, 1892;
Voucher No. 20, $24,529.95, December, 1892,
Voucher No. 26, $493.59, January, 1893;

Voucher No. 3, $20,274.07, February, 1893;
Voucher No. 2, $16,433.14, March, 1893;
Voucher No. 1, $14,218.86, April, 1893;
Voucher No. 2, $27,436.06, May, 1893;
Voucher No. 5, $9,337.85, May, 1893;
Voucher No. 6, $26,706.46, May, 1893;

and those indicated and designated by the following vouchers, and the entries therein and endorsements thereon, submitted by the said Captain Carter with his accounts and marked 'Appropriations for improving harbor at Savannah, Georgia:'

Voucher No. 11, $3,265.61, November, 1892;
Voucher No. 2, $15,000.00, December, 1892;
Voucher No. 24, $8,507.45, December, 1892;
Voucher No. 28, $20,000.00, December, 1892;
Voucher No. 3, $25,416.81, January, 1893;
Voucher No. 1, $42,722.83, February, 1893;
Voucher No. 3, $15.71, February, 1893;
Voucher No. 2, $44,985.47, March, 1893;
Voucher No. 8, $38,076.11, March, 1892;
Voucher No. 2, $20,584.51, April, 1893;
Voucher No. 4, $30,000.00, May, 1893;
Voucher No. 28, $6,105.69, May, 1893;
Voucher No. 3, $5,968.18, July, 1893;
Voucher No. 4, $34,177.94, July, 1893;
Voucher No. 5, $46,592.39, July, 1893;
18 Voucher No. 2, $57,013.64, August, 1893;
Voucher No. 1, $97,159.99, September, 1893;
Voucher No. 1, $59,554.84, October, 1893;
Voucher No. 1, $52,452.22, November, 1893;
Voucher No. 2, $85,752.28, December, 1893;
Voucher No. 1, $44,175.02, January, 1894;
Voucher No. 2, $27,057.00, January, 1894;
Voucher No. 4, $75,118.71, February, 1894;
Voucher No. 6, $44,630.22, March, 1894;
Voucher No. 7, $202,481.40, July, 1894;
Voucher No. 10, $481,933.67, September, 1894;
Voucher No. 7, $88,922.63, October, 1894;
Voucher No. 48, $44,303.92, November, 1894;
Voucher No. 11, $38,903.72, December, 1894;
Voucher No. 41, $39,368.67, January, 1895;
Voucher No. 7, $31,659.28, February, 1895;
Voucher No. 10, $25,612.62, March, 1895;
Voucher No. 30, $63,656.50, April, 1895;
Voucher No. 22, $19,860.08, May, 1895;

and those indicated and designated by the following vouchers (and the entries therein and endorsements thereon), submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving Jekyl creek, Georgia':

Voucher No. 2, $3,309.40, June, 1893;
Voucher No. 1, $3,595.38, July, 1893;

and the one indicated and designated by the following voucher (and

the entries therein and endorsements thereon), submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving waterway between Savannah, Georgia, and Ferdinanda, applied to that work at Jekyl creek, Georgia':

Voucher No. 1, $14,591.00, July, 1893;

and those indicated and designated by the following vouchers (and the entries therein and endorsements thereon), submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving Cumberland sound, Georgia':

Voucher No. 12, $874.73, December, 1894;

Voucher No. 42, $9,845.35, January, 1895;

Voucher No. 8, $17,800.50, February, 1895;

and those indicated and designated by the following vouchers (and the entries therein and endorsements thereon), submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving Cumberland sound, Georgia and Florida':

Voucher No. 9, $21,287.65, March, 1895;

Voucher No. 29, $29,659.82, April, 1895;

Voucher No. 23, $32,059.92, May, 1895;

19 and the one indicated and designated by the following voucher (and the entries therein and endorsements thereon), submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving harbor at Darien, Georgia':

Voucher No. 16, $17,728.81, June, 1895;

and the one indicated and designated by the following voucher (and the entries therein and endorsements thereon), submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving harbor at Darien, Georgia. Improving Altahama river, Georgia. Improving water way between Savannah, Georgia, and Ferdinanda, Florida. Improving Jekyl creek, Georgia':

Voucher No. 14, $27,861.32, July, 1895;

and the said Captain Carter causing each of the said payments to be made in or about the month named in the above description of the voucher relating to it, by drawing and delivering a check as such officer in charge of river and harbor improvements, by which he ordered and directed that the amount indicated be paid out of the moneys of the United States then under his control as such officer."

Specification II.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, being the officer in local charge for the United States of river and harbor improvements in the Savannah river and harbor district, did wilfully and knowingly cause the following amounts to be paid out of the moneys of the United States subject to his order and control as officer in charge of said improvements to the Atlantic Contracting Company, a corporation; the accounts on which the same were paid being false, and the amounts paid not being due or owing from the United States to the said company, or to any one, and he, the said Captain Carter, well knowing this to be the case; the said accounts and amounts paid and the payments being those designated by the following voucher (and the entries therein and endorsements thereon), submitted by

the said Captain Carter with his accounts and marked 'Appropriation for improving harbor at Savannah, Georgia':

Voucher No. 8, $230,749.90, July, 1897;

and the one indicated and designated by the following voucher (and the entries therein and endorsements thereon), submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving Cumberland sound, Georgia and Florida':

Voucher No. 9, $345,000, July, 1897;

each of the said payments having been caused to be made on or about July 6, 1897, by the said Captain Carter drawing and delivering a check as such officer in charge of river and harbor improvements, by which the payment was ordered and directed to be made out of moneys of the United States under his control as such officer."

Specification III.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, being the engineer officer in local charge of the works of river and harbor improvement of the Savannah district, did, at Savannah, Georgia, on or about December 31, 1899, in submitting to the Chief of Engineers, United States Army, a comparative estimate of the cost of improving Savannah harbor, in which estimate there was an item of '360,000 square yards brush mattresses,' make the following statement regarding said item:

"'In the specifications only 200,000 square yards of mattresses are given, but as new soundings show that 300,000 square yards will be required, this estimate has been changed as provided in par. 44 of the specifications.'

"Meaning by the word 'specifications' the specifications to the contract with the Atlantic Contracting Company for improving Savannah harbor, dated October 8, 1896, which statement was false in fact, as no new soundings had been made between June 6, 1896, the date of said specifications, and said date of making said false statement, and which statement was known by him (the said Captain Carter) to be false in fact and was intended to deceive."

Specification IV.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, being the engineer officer in local charge of the works of river and harbor improvement of the United States in the Savannah district, having caused to be prepared a pay-roll, the same being voucher No. 30 to his account with the United States for the month of December, 1896, appropriation for improving harbor at Savannah, Georgia, and having caused to be entered on said voucher the names of certain persons as laborers during the month of December, 1896, and having caused to be paid to said persons divers sums amounting in all to twenty-nine dollars and fifty cents ($29.50), did make and sign the following certificate on said voucher, to wit:

"'I certify that the above pay-roll is correct and just, and the "days" for which payments have been made were days of eight hours each.

O. M. CARTER,
Capt. Corps of Engineers.'

which certificate was false and fraudulent in that none of said persons had rendered service as laborers as set forth in said
21 voucher No. 30; and which certificates were known by him, the said Captain Carter, to be false and was intended to deceive.

"This at Savannah, Georgia, on or about December 21, 1896."

Specification V.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, being the engineer officer in local charge of the works of river and harbor improvements of the Savannah district, having caused to be entered on voucher No. 5 to his account with the United States for the month of January, 1897, appropriation for improving Savannah harbor, at Savannah, Georgia, among other things, an account against the United States, for the construction by the Atlantic Contracting Company, during the month of December, 1896, of seventy six (76) linear feet of piling in repairing the Garden Bank training wall, near Savannah, Georgia, at $1.60 per linear foot, amounting to $121.60, did make and sign the following certificate on said voucher, to wit:

"'I certify that the above account is correct and just; the articles have been expended and applied to the purpose for which purchased. The mode of expenditure adopted was the most economical and advantageous to the Government.

O. M. CARTER,
Capt. Corps of Engineers.'

which certificate was false in fact in that only forty-eight linear feet of the piling charged in said account *was* actually constructed, and the service actually rendered as to the other twenty-eight (28) feet charged for was not the construction of piling in repairing said training wall, but was the driving of seven (7) guide-piles for sinking mattresses; the said guide-piles having been driven by said Atlantic Contracting Company for itself and its sole use and convenience in sinking said mattresses; and which said certificate was well known by the said Carter to be false in fact, and was intended to deceive.

"This at Savannah, Georgia, on or about January 12, 1897."

Specification VI.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, being the engineer officer in local charge of the works of river and harbor improvement of the Savannah district, having caused to be entered on voucher No. 27 to his account with the United States for the month of March, 1897, appropriation for improving the harbor of Savannah, Georgia, an account against the United States for the construction, by the Atlantic Contracting Company, during the month of February, 1897, of two hundred and forty (240) linear feet of pile-work in repairing training walls near Savannah, Georgia, at $1.60 per linear foot,
22 amounting to $384, did make — sign the following certificate on said voucher, to wit:

"'I certify that the above account is correct and just; the articles have been expended and applied to the purpose for which purchased.

The mode of expenditure adopted was most economical and advantageous to the Government.

O. M. CARTER,
Capt. Corps of Engineers.'

which said certificate was false in fact, in that the service actually rendered was not the construction of two hundred and forty (240) linear feet of pile-work in repairing said training walls, but was the driving of sixty (60) guide-piles for sinking mattresses; the said guide-piles having been driven by the said Atlantic Contracting Company for itself and its sole use and convenience in sinking said mattresses; and which said certificate was well known by the said Carter to be false in fact, and was intended to deceive.

"This at Savannah, Georgia, on or about the tenth day of March, 1897."

Specification VII.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, being the engineer officer in local charge of the works of river and harbor improvement of the Savannah district, having caused to be entered in voucher No. 21 to his account with the United States for the month of June, 1897, appropriation for improving harbor at Savannah, Georgia, an account against the United States for the construction by the Atlantic Contracting Company during the month of May, 1897, of sixty-eight (68) linear feet of pile dams in repairing training wall and spur dams near Savannah, Georgia, at $1.60 per linear foot, amounting to $108.80, did make and sign the following certificate on said voucher, to wit:

"'I certify that the above account is correct and just. The mode of expenditure adopted was the most economical and advantageous to the Government.

O. M. CARTER,
Capt. Corps of Engineers.'

which certificate was false in fact, in that the service actually rendered was not the construction of sixty-eight (68) linear feet of pile dams in repairing said training walls and spur dams, but was the driving of seventeen (17) guide-piles for sinking mattresses; the said guide-piles having been driven by said Atlantic Contracting Company for itself and its sole use and convenience in sinking said mattresses; and which said certificate was well known by the said Carter to be false in fact and was intended to deceive.

23 "This at Savannah, Georgia, on or about the nineteenth day of June, 1897."

Specification VIII.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, devising and intending to defraud the city of Savannah, Georgia, and to aid the Atlantic Contracting Company, a corporation, and John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Anson M. Bangs, and divers other persons, all of whom were likewise with him, the said Captain Carter, devising and intending to defraud the said city, did, on or about February 20, 1896, and thereafter to June 30, 1896, with the said company and

the persons named, unlawfully combine and conspire to defraud the said city of divers large sums of money, and to wrongfully compel it, the said city, to dispose of certain valuable rock owned by it, under unfavorable circumstances to it, in order that the said Atlantic Contracting Company might be enabled to purchase the same from the city at a price far below the real cost and value of the same; and in pursuance of the said conspiracy, the said Captain Carter, during the months of February, March, April, May and June, 1896, being the officer of the United States in charge of the river and harbor district, usually called the Savannah district and of the improvements by the United States of rivers and harbors in said district in which the said rock was situated (in a body of navigable water, and outside of the harbor lines of the same, by and under the revocable permission of the Secretary of War), did use his said position as officer in charge of said district and improvements, and the powers and influence of the same, to have the Secretary of War revoke the said permission and require the said city to remove its said rock from the position occupied by it in the harbor; the means used by him to accomplish this being, among other things, false and misleading statements in letters to his superior officers, and in endorsements on letters referred to him from the War Department, as to the necessity for prompt and speedy removal of the said rock from the position occupied by it in the harbor; and also like statements and other representations made by him to various officials of the said city, and others, orally and in writing."

Specification IX.—"In that Oberlin M. Carter, Corps of Engineers, United States Army, being the officer in charge of the Savannah river and harbor district, and having been required by the Chief of Engineers, United States Army, by the endorsement on the letter of one Paulding, to furnish information in regard to the proposed acquisition by the United States of certain lands on Hutchin-
24 son's island, near Savannah, Georgia, for river and harbor improvement purposes, did, in an endorsement of said letter, dated October 21, 1896, state as follows, to wit:

"'When operations were to begin, excessive rentals were demanded by property-owners, some of whom had taken possession of wharves as a speculation with a view to obtaining excessive damages. The work would have been delayed and its cost increased by about $50,000, and it was therefore abandoned;' which said statement was false, and was known to him, the said Captain Carter, to be false, and was intended by him to deceive Brigadier General William P. Craighill, Chief of Engineers, United States Army.

"This at Savannah, Georgia, on or about October 21, 1896."

Specification X.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, being duly sworn as a witness for the defendant in the case of James B. Brown *v.* The Atlantic Contracting Company, then pending in the city court of Savannah, Georgia, in which the subject-matter of the litigation was certain rock said to have been delivered by the said Brown to the said company, and then by the company to the United States, to go into certain river and harbor improvements carried on under the said Captain Carter

as officer in charge for the United States, did testify on oath in regard to said rock to the effect that the United States did not receive and pay for it, but that they merely allowed the company to dump the same into the works along with the rock received and paid for, the said company not being paid for it; which said testimony was false, in that the United States had received and paid said company for it, and was well known by the said Captain Carter to be false, and was intended by him to deceive the said court and its jury empaneled to try the said case.

"This at Savannah, Georgia, on or about March 15, 1897."

Specification XI.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, being the engineer officer in local charge of the works of river and harbor improvements of the United States in the Savannah district, and having received from one Alfred Hirt, for the United States, on or about December, 1896, the sum of one hundred and thirty-two dollars and ten cents ($132.10) on account of delay of said Hirt in returning, and expense of returning, a diving outfit belonging to the United States and pertaining to the United States snag-boat Satilla, did fail to account, and has failed to account, to the United States for the said sum, or any part thereof, from the time of receiving said sum to the present time, viz., December 10, 1897."

Specification XII.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, being in the city of New York, on or about the 25th day of May, 1897, did, while there, cause a telegram to be sent to the Secretary of War, purporting to come from him in Savannah, Georgia, whereby he intended to deceive the Secretary of War as to where he, the said Captain Carter, was on that date.

"This was at New York, on or about May 25, 1897."

Specification XIII.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, having left Savannah, Georgia, on or about the 2d day of August, 1894, and having gone to the State of Montana, did on the 16th day of August, 1894, cause a letter to be forwarded to the Chief of Engineers, United States Army, dated Savannah, Georgia, reporting his, this said Captain Carter's, departure from Savannah on that day, whereby he intended to deceive Brigadier General Thomas L. Casey, Chief of Engineers, United States Army.

"This in Montana, on or about August 16th, 1894."

Specification XIV.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, in a personal report of himself as such officer, made to the Chief of Engineers, United States Army, for the month of April, 1894, did report himself present at his station from the 3rd to the 7th day of April, 1894, both inclusive, which said report was false, in that he was absent from his station during said time (part of it in New York); and which report was well known to him to be false, and was intended to deceive.

"This on or about April 30th, 1894."

Specification XV.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, in a personal report of himself as

such officer, made to the Chief of Engineers, United States Army, for the month of August, 1894, did report himself present at his station from the 3rd to the 15th day of August, 1894, both inclusive, which said report was false, in that he was absent from his station during said time (part of it in New York, St. Paul, and Yellowstone national park); and which report was well known to him to be false, and was intended to deceive.

"This on or about August 31st, 1894."

Specification XVI.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, in a personal report of himself as such officer, made to the Chief of Engineers, United States
26 Army, for the month of September, 1894, did report himself present at his station from the 23rd to the 27th day of September, 1894, both inclusive, which said report was false, in that he was absent from his station during said time (part of it in Cincinnati, Ohio); and which report was well known to him to be false and was intended to deceive.

"This on or about September 30, 1894."

Specification XVII.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, in a personal report of himself as such officer made to the Chief of Engineers, United States Army, for the month of October, 1894, did report himself as present at his station on the 4th and 5th days of October, 1894, which said report was false, in that he was absent from his station during said days, and which report was well known to him to be false, and was intended to deceive.

"This on or about October 31, 1894."

Specification XVIII.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, in a personal report of himself as such officer, made to the Chief of Engineers, United States Army, for the month of November, 1894, did report himself present at his station on the 11th and 12th days of November, 1894, which said report was false, in that he was absent from his station during said time (part of it in New York); and which report was well known to him to be false, and was intended to deceive.

"This on or about November 30, 1894."

Specification XIX.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, in a personal report of himself as such officer, made to the Chief of Engineers, United States Army, for the month of December, 1894, did report himself present at his station from the 8th to the 12th day of December, 1894, both inclusive, and from the 24th to the 31st day of December, 1894, both inclusive, which said report was false, in that he was absent from his station during said times (parts of them in New York); and which report was well known to him to be false and was intended to deceive.

"This on or about December 31, 1894."

Specification XX.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, in a personal report of himself as such officer, made to the Chief of Engineers, United States Army, for the month of January, 1895, did report himself present at his

station from the 1st to the 9th day of January, 1895, both inclusive,
which said report was false, in that he was absent from his
27 station during said time (part of it in New York), and which
report was well known to him to be false and was intended to deceive.

"This on or about January 31, 1895."

Specification XXI.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, in a personal report of himself as such officer, made to the Chief of Engineers, United States Army, for the month of July, 1895, did report himself present at his station from the 3d to the 9th day of July, 1895, both inclusive, which said report was false, in that he was absent from his station during said time (part of it in New York), and which report was well known to him to be false and intended to deceive.

"This on or about July 31, 1895."

Specification XXII.—"In that Oberlin M. Carter, Corps of Engineers, United States Army, in a personal report of himself as such officer, made to the Chief of Engineers, United States Army, for the month of March, 1897, did report himself present at his station from the 2d to the 9th day of March, 1897, both inclusive, which said report was false, in that he was absent from his station during said time (part of it in New York); and which report was well known to him to be false, and was intended to deceive.

"This at Savannah, Georgia, on or about the 31st day of March, 1897."

Specification XXIII.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, in a personal report of himself as such officer, made to the Chief of Engineers, United States Army, for the month of May, 1897, did report himself present at his station on the 24th day of May, 1897, which said report was false, in that he was absent from his station on said day (and was in New York), and which report was well known to him to be false, and was intended to deceive.

"This at Savannah, Georgia, on or about May 31, 1897."

Charge IV.—"Embezzlement, as defined in section 5488, Revised Statutes of the United States, in violation of the 62d article of war."

Specification I.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, being the officer in charge for the United States of river and harbor improvements in the Savannah river and harbor district, and, as such officer, in charge of said improvements, being a disbursing officer of the United States, and having entrusted to him large amounts of public money of the United States, did wilfully and knowingly apply for a purpose not authorized by law large sums of the said moneys so entrusted to
28 him, by wilfully and knowingly causing the amounts hereinafter named to be paid out of the said moneys which were subject to his order and control of such officer in charge of said improvements; the accounts on which the same were being paid being false, the amounts paid not being due or owing from the United States to the parties paid, or to any one, and he, the said Captain Carter, well knowing this to be the case; the said accounts, the

amounts paid, and the payments being those designated by the following voucher (and the entries therein and the endorsements thereon), submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving harbor at Savannah, Georgia':

Voucher No. 8 ($230,749.90), July, 1897;

and the one indicated and designated by the following voucher (and the entries therein and endorsements thereon), submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving Cumberland sound, Georgia and Florida':

Voucher No. 9 ($345,000,*000*), July, 1897;

each of the said payments having been caused to be made on or about July 6, 1897, by the said Captain Carter drawing and delivering a check as such officer in charge of river and harbor improvements, by which the payment was ordered and directed to be made out of moneys of the United States under his control as such officer."

Specification II.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, being the officer in charge for the United States of river and harbor improvements in the Savannah river and harbor district, and as such officer in charge of said improvements, being a disbursing officer of the United States, and having entrusted to him large amounts of public money of the United States, did wilfully and knowingly apply, for a purpose not authorized by law, large sums of the said moneys so entrusted to him, by wilfully and knowingly causing the following amounts to be paid out of the said moneys which were subject to his order and control as such officer in charge of said improvements; the accounts on which the same were paid being false, the amounts paid not being due or owing from the United States to the parties paid, or to any one, and he, the said Captain Carter, well knowing this to be the case; the said accounts, the amounts paid, and the payments being those designated by the following vouchers (and the entries therein and endorsements thereon), submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving Cumberland sound, Georgia and Florida':

Voucher No. 18, for $1,713.23, November, 1892;

Voucher No. 13, for $21,102.67, December, 1892;

29 Voucher No. 20, for $24,529.95, December, 1882;

Voucher No. 26, for $493.59, January, 1893;

Voucher No. 3, for $20,274.07, February, 1893;

Voucher No. 2, for $16,433.14, March, 1893;

Voucher No. 1, for $14,218.86, April, 1893;

Voucher No. 2, for $27,436.06, May, 1893;

Voucher No. 5, for $9,337.85, May, 1893;

Voucher No. 6, for $26,706.46, May, 1893;

and those indicated and designated by the following vouchers (and the entries therein and endorsements thereon) submitted by the said Captain Carter with his accounts, and marked 'Appropriation for improving harbor at Savannah, Georgia':

Voucher No. 11, $3,265.61, November, 1892;

Voucher No. 2, $15,000, December, 1892;
Voucher No. 24, $8,507.45, December, 1892;
Voucher No. 28, $20,000, December, 1892;
Voucher No. 3, $25,416.81, January, 1893;
Voucher No. 1, $42,722.83, February, 1893;
Voucher No. 3, $15.71, February, 1893;
Voucher No. 2, $44,985.47, March, 1893;
Voucher No. 8, $38,076.11, March, 1893;
Voucher No. 2, $20,584.51, April, 1893;
Voucher No. 4, $30,000, May, 1893;
Voucher No. 28, $6,105.69, May, 1893;
Voucher No. 3, $5,968.18, July, 1893;
Voucher No. 4, $34,177.94, July, 1893;
Voucher No. 5, $46,592.39, July, 1893;
Voucher No. 2, $57,013.64, August, 1893;
Voucher No. 1, $97,159.99, September, 1893;
Voucher No. 1, $59,554.84, October, 1893;
Voucher No. 1, $52,452.22, November, 1893;
Voucher No. 2, $85,752.28, December, 1893;
Voucher No. 1, $44,175.02, January, 1894;
Voucher No. 2, $27,057.00, January, 1894;
Voucher No. 4, $75,118.71, February, 1894;
Voucher No. 6, $44,630.22, March, 1894;
Voucher No. 7, $202,481.40, July, 1895;
Voucher No. 10, $481,933.67, September, 1894;
Voucher No. 7, $88,922.63, October, 1894;
Voucher No. 48, $44,303.91, November, 1894;
Voucher No. 11, $38,903.72, December, 1894;
Voucher No. 41, $39,368.67, January, 1895;
Voucher No. 7, $31,659.28, February, 1895;
Voucher No. 10, $25,612.62, March, 1895;
Voucher No. 30, $63,656.50, April, 1895;
Voucher No. 22, $19,860.08, May, 1895;

and those indicated and designated by the following vouchers (and the entries therein and endorsements thereon) submitted by
30 the said Captain Carter with his accounts and marked 'Appropriation for improving Jekyl creek, Georgia':

Voucher No. 2, $3,309.40, June, 1893;
Voucher No. 1, $3,595.38, June, 1893;

and the one indicated and designated by the following voucher (and the entries therein and endorsements thereon) submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving waterway between Savannah, Georgia, and Ferdinanda, Florida, applied to that work at Jekyl creek, Georgia':

Voucher No. 1, $14,591.00, July, 1893;

and those indicated and designated by the following vouchers (and the entries therein and endorsements thereon) submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving Cumberland sound, Georgia':

Voucher No. 13, $874.73, December, 1894;
Voucher No. 42, $9,854.35, January, 1895;
Voucher No. 8, $17,800.50, February, 1895;

and those indicated and designated by the following vouchers (and the entries therein and endorsements thereon) submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving Cumberland sound, Georgia and Florida':

Voucher No. 9, $21,287.65, March, 1895;

Voucher No. 29, $29,659.82, April, 1895;

Voucher No. 23, $32,059.92, May, 1895;

and the one indicated and designated by the following voucher (and the entries therein and endorsements thereon) submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving harbor at Darien, Georgia':

Voucher No. 16, $17,728.81, June, 1895;

and the one indicated and designated by the following voucher (and the entries therein and endorsements thereon) submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving harbor at Darien, Georgia. Improving Altahama river, Georgia. Improving waterway between Savannah, Georgia, and Ferdinanda, Florida. Improving Jekyl creek, Georgia':

Voucher No. 14, $27,861.32, July, 1895;

the said Captain Carter causing each of the said payments to be made in or about the month named in the above description of the voucher relating to it by drawing and delivering a check as such officer in charge of river and harbor improvements, by which he ordered and directed that the amount indicated be paid out of the moneys of the United States then under his control as such officer."

To which charges and specifications the accused, Captain Oberlin M. Carter, Corps of Engineers, pleaded as follows:

31 Charge I.

To the first specification, in bar of trial, the statute of limitation (103d article of war), which plea was sustained by the court.

To the 2d specification, "Not guilty."

To the charge, "Not guilty."

Charge II.

To the 1st, 2d, 3d, 4th, and 5th specifications, in bar of trial, the statute of limitation (103d article of war); which plea was sustained by the court.

To the 6th specification, "Not guilty."

To the 7th specification, "Not guilty."

To the 8th specification, "Not guilty."

To the 9th specification, "Not guilty."

To the 10th specification, "Not guilty."

To the charge, "Not guilty."

Charge III.

To the 1st specification, in bar of trial, the statute of limitation (103d article of war); which plea was sustained by the court.

To the 2d specification, "Not guilty."

To the 3d specification, "Not guilty."

To the 4th specification, "Not guilty."

To the 5th specification, "Not guilty."
To the 6th specification, "Not guilty."
To the 7th specification, "Not guilty."
To the 8th specification, "Not guilty."
To the 9th specification, "Not guilty."
To the 10th specification, "Not guilty."
To the 11th specification, "Not guilty."
To the 12th specification, "Not guilty."
To the 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, and 21st specifications, in bar of trial, the statute of limitation (103d article of war); which plea was sustained by the court.
To the 22d specification, "Not guilty."
To the 23d specification, "Not guilty."
To the charge, "Not guilty."

Charge IV.

To the 1st specification, "Not guilty."
To the 2d specification, in bar of trial, the statute of limitation (103d article of war); which plea was sustained by the court.
To the charge, "Not guilty."

32 *Finding.*

And the court, after due deliberation, finds the accused, Captain Oberlin M. Carter, Corps of Engineers, as follows:

Charge I.

Of the 2d specification, "Guilty, except the words 'and other material' and interpolating the word 'and' between the words 'mattresses' and 'stone' wherever those words occur in the specification, of the excepted words not guilty and of the interpolated words guilty."
Of the charge, "Guilty."

Charge II.

Of the 6th specification, "Guilty, except of the words 'and other material' where they occur the second and third time and interpolating the word 'and' between the words 'mattresses' and 'stone' where they occur the second and third time; of the excepted words not guilty; of the interpolated word guilty."
Of the 7th specification, "Guilty."
Of the 8th specification, "Guilty."
Of the 9th specification, "Guilty."
Of the 10th specification, "Guilty."
Of the charge, "Guilty."

Charge III.

Of the 2d specification, "Guilty."
Of the 3d specification, "Guilty."
Of the 4th specification, "Guilty."

Of the 5th specification, "Guilty, except of the words 'the articles have been' and of the excepted words not guilty."
Of the 6th specification, "Guilty."
Of the 7th specification, "Guilty."
Of the 8th specification, "Not guilty."
Of the 9th specification, "Guilty."
Of the 10th specification, "Not guilty."
Of the 11th specification, "Guilty."
Of the 12th specification, "Not guilty."
Of the 22d specification, "Guilty."
Of the 23d specification, "Not guilty."
Of the charge, "Guilty."

Charge IV.

Of the 1st specification, "Guilty."
Of the charge, "Guilty."

33 *Sentence.*

And the court does therefore sentence the accused, Captain Oberlin M. Carter, Corps of Engineers, United States Army, "to be dismissed from the service of the United States, to suffer a fine of five thousand dollars, to be confined at hard labor at such place as the proper authority may direct for five years, and the crime, punishment, name and place of abode of the accused to be published in the newspapers in and about the station and in the State from which the accused came, or where he usually resides."

The record of the proceedings of the general court-martial in the foregoing case of Captain Oberlin M. Carter, Corps of Engineers, having been submitted to the President, the following are his orders thereon:

The findings of the court-martial in the matter of the foregoing proceedings against Captain Oberlin M. Carter, Corps of Engineers, U. S. Army, are hereby approved as to all except the following:

Charge 2. Specifications seven, eight, nine, and ten.

Charge 3. Specifications three, four, five, six, seven, nine, eleven, and twenty-two, which are disapproved. And the sentence imposed by the court-martial upon the defendant, Oberlin M. Carter, is hereby approved.

ELIHU ROOT,
Secretary of War.

EXECUTIVE MANSION,
WASHINGTON, D. C., *September* 29, 1899.

Approved and confirmed.

WILLIAM McKINLEY.

By direction of the Secretary of War, Captain Oberlin M. Carter, Corps of Engineers, ceases to be an officer of the army from this date, and the United States penitentiary, Fort Leavenworth, Kansas, is designated as the place for his confinement, where he will be sent

by the commanding general, Department of the East, under proper guard.

By command of Major General Miles:

H. C. CORBIN,
Adjutant General.

(Official copy.)
H. C. CORBIN,
Adjutant General.

Your petitioner further avers that said Carter, in pursuance of said sentence, has been dismissed from the Army of the
34 United States, and the order of dismissal, as your petitioner is informed and believes, has been duly personally served upon him; that the crime, punishment, name and place of abode of said Carter has been published in the newspapers in and about his station, and in and about the State whence said Carter came and where he usually abode, as your petitioner is informed and believes; and that said Carter has paid unto the United States the fine of five thousand dollars ($5,000) imposed by said sentence, as your petitioner is informed and believes.

Your petitioner further avers that the said Carter having been cashiered the army, having suffered degradation, and having paid the fine imposed, as above set forth, his imprisonment and detention are contrary to law, are in violation of the Constitution of the United States and are illegal and without any warrant of law, for the following reasons, that is to say:

First. Your petitioner avers that there was no evidence delivered before said court-martial which tended to show that any crime whatever had been committed, or which tended to show that any crime had been committed by the said Carter; but, on the contrary, all of said evidence, taken together, affirmatively showed that there was no *corpus delicti*, and that said Carter was wholly innocent of any wrong-doing, and that in imposing the sentence above set out said court-martial acted beyond its jurisdiction, and said sentence was and is wholly void. Your petitioner has no copy of said evidence, and he is informed and believes that the only complete copy thereof is in the hands of the Attorney General of the United States, but he attaches hereto, makes part hereof, and marks the same Exhibit A, an abstract of all the evidence adduced before said court-martial.

Second. Your petitioner avers that the finding of said Carter guilty by said court-martial of charge IV, and the specification thereunder, and the imposing of sentence on him as for a violation of the 62d article of war, mentioned in said charge, were and each of them was wholly illegal and void, for that:

(*a.*) It was shown by the evidence before said court-martial, and it appears from an examination of the charges and specifications alleged against said Carter, that the two sums of money alleged in said specification to said charge IV to have been paid out by said Carter "for a purpose not authorized by law" were paid out by said Carter under and in accordance with the specifications of two certain contracts between the United States of America and the Atlantic

Contracting Company, dated September 8, A. D. 1896, for the improvement of Savannah harbor and Cumberland sound, re-
35 spectively, which said contracts were entered into pursuant to the act of Congress approved June 3, 1896.

(*b.*) It appears from an inspection of the specification under said charge IV that the acts described in said specification were not in violation of article 62, section 1342, Revised Statutes of the United States (the 62nd article of war), and were not cognizable by a court-martial under said article, but if justiciable at all by said court-martial, were justiciable under article 60 of said section 1342 (the 60th article of war).

Third. Your petitioner further avers that said imprisonment and detention are illegal and contrary to article 102 of section 1342, Revised Statutes of the United States, which prohibits a second trial for the same offense, and contrary to the fifth amendment of the Constitution of the United States, in this:

(*a.*) That it appears from the charges and specifications upon which said Carter was tried by said court-martial, and it also appears from the evidence delivered before said court-martial that the payment of the two checks drawn by said Carter and described in each of the specifications under which he was convicted are the only basis of each of said four charges, and that the single act of drawing said two checks has been carved up into four distinct and different crimes, and a punishment assessed on each.

(*b.*) That the sentence of said court-martial was beyond its powers and void, for that under said 60th article of war said court-martial was authorized to inflict the punishment of a fine or an imprisonment or such other punishment as it might adjudge.

(*c.*) That under the 61st article of war (art. 61, R. S. U. S., § 1342), the violation of which was laid in said charge III, said court-martial had jurisdiction to inflict the punishment of dismissal from the army only.

(*d.*) That the facts set out in the specifications under charges I, II and IV, respectively, bring the offense therein described under the said 60th article of war, under which the said court-martial had jurisdiction only to inflict a fine or an imprisonment or some other punishment, in the alternative, and not cumulatively.

Fourth. Your petitioner further alleges that the punishment of fine and imprisonment were and each of them was beyond the power of said court-martial to inflict, because the same were imposed upon said Carter after he had ceased to be an officer of the Army of the United States, and after he had ceased to be subject to the jurisdiction of a court-martial.

Fifth. Your petitioner further avers that said punishment
36 of imprisonment was beyond the powers of said court-martial, and void in this—that under and by virtue of an act of Congress approved September 27, 1890, the President of the United States, by an order dated March 20, 1895, fixed the maximum punishment for a violation by an enlisted man in the Army of the United States of the 60th article of war, and for a violation by such person of the 62nd article of war, by embezzlement of more

than one hundred dollars, at a term of four years' confinement at hard labor, under each article; and thereafter, on October 31, 1895, the President of the United States, in accordance with the terms of said act of Congress, prescribed that said maximum limits should extend to all such violations whether by officers or enlisted men of the army. Said last-named order is to be found in army regulations promulgated by the order of the President on October 31, 1895, as follows: "Art. 938. Whenever, by any of the articles of war, punishment is left to the discretion of the court, it shall not, in time of peace, be in excess of a limit which the President may prescribe. The limits so prescribed are set forth in the Manual for Courts-martial, published by authority of the Secretary of War."

Petitioner avers that said limits are prescribed in said manual as hereinabove set out, and that said order of October 31, 1895, was in full force and effect when said court-martial passed its sentence of five years' imprisonment upon said Carter.

Sixth. Your petitioner further avers that said sentence is wholly void in this that said court-martial found the said Captain Carter guilty of charge one and of specification two thereunder; of charge two and specifications six, seven, eight, nine and ten thereunder; of charge three and specifications two, three, four, five, six, seven, nine, eleven and twenty-two thereunder; and of charge four and specification one thereunder; and thereupon sentenced the said Carter to be punished as hereinabove set forth; but the President of the United States disapproved the findings of said court-martial as to specifications seven, eight, nine and ten, under charge two, and specifications three, four, five, six, seven, nine, eleven and twenty-two under charge three, and approved the said sentence as originally fixed by the said court; the said several specifications so approved and the said several specifications so disapproved, charging several and distinct offenses, growing out of several, distinct and disconnected transactions, said several offenses charged not being of the same class of crimes.

That the sentence thus confirmed by the said President of the United States was not the sentence of said court-martial, and was not in mitigation or commutation of such sentence, but was, for the offenses of which said Carter was finally determined to be guilty, in excess of the sentence imposed by said court-martial.

Your petitioner further avers that heretofore, to wit, on October 2, A. D. 1899, said Oberlin M. Carter, through Abram J. Rose, applied to the United States circuit court for the southern district of New York for a writ of *habeas corpus*, which said writ was, on, to wit, October 20, 1899, by said court, dismissed.

That thereafter, on, to wit, January 24, 1900, the decision of said circuit court was affirmed by the United States circuit court of appeals for the second circuit.

That thereafter the petitioner last named prosecuted error to said circuit court and certiorari out of the Supreme Court of the United States, but said Supreme Court did, on, to wit, April 23, 1900, dismiss the appeal and writ of error.

Copies of the opinions in each of said courts are hereto attached, made part hereof and marked respectively Exhibits B, C and D.

Your petitioner further avers that this application is made upon the same evidence as in the application to the said circuit court for the southern district of New York, to wit, the evidence adduced before said court-martial.

37 Wherefore your petitioner prays that the writ of *habeas corpus* issue out of this court, directed to the said Robert W. McClaughry, warden as aforesaid, commanding him to have the body of the said Oberlin M. Carter before this honorable court, as shall be directed in said writ, to do and receive what shall be considered by the court meet and proper, and that he may be restored to his liberty.

I. STANTON CARTER.

UNITED STATES OF AMERICA, }
Northern District of Illinois, Northern Division, } ss:

I. Stanton Carter, being duly sworn, upon his oath deposes and says that he is the petitioner in the foregoing application subscribed by him; that he has read the same and knows the contents thereof; and that the same is true of his own knowledge, save and except as to those statements alleged to be upon information and belief, and as to those matters he believes it to be true.

I. STANTON CARTER.

FRANK P. BLAIR,
[SEAL.] *Att'y for Petitioner.*

Subscribed and sworn to before me this 22nd day of June, A. D. 1900.

S. W. BURNHAM,
Clerk U. S. Cir. Court, Nor. Dist. of Ill.

Endorsed: No. 7849. Oberlin M. Carter, on the petition of I. Stanton Carter, petitioner, *vs.* Robert W. McClaughry. Application for a writ of *habeas corpus.* Filed Oct. 17, 1900. Geo. F. Sharitt, clerk.

38 & 39 In the Circuit Court of the United States for the District of Kansas, First Division.

OBERLIN M. CARTER, on the Petition of I. STANTON CARTER, Petitioner,
vs.
ROBERT W. MCLAUGHRY.

Now, on this 17th day of October, A. D. 1900, there being presented to this court in open session a duly verified application of the said I. Stanton Carter for the allowance of a writ of *habeas corpus,* upon reading and considering said application—

It is ordered by the court that a writ of *habeas corpus* issue to be served upon Robert W. McLaughry, warden of the United States

penitentiary at Fort Leavenworth, Kansas, the same being also called the United States prison at Fort Leavenworth, Kansas, and that said writ be made returnable before this court on the 26th day of October, A. D. 1900, at 10 o'clock a. m. of that day.

WILLIAM C. HOOK, *Judge.*

Endorsed: No. 7849. *In re* Oberlin M. Carter, petitioner. Order for a writ of *habeas corpus.* Filed Oct. 17, 1900. Geo. F. Sharitt, clerk.

40 In the Circuit Court of the United States, Eighth Judicial Circuit.

OBERLIN M. CARTER, on the Petition of I. Stanton Carter, Petitioner, *vs.* ROBERT W. MCCLAUGHREY. } Petition for Writ of *Habeas Corpus.*

Comes now the above petitioner and, leave of court thereto first having been had, files this his amendment to the petition heretofore filed in this cause.

On the last page of said petition and next preceding the prayer thereof the following allegation:

And your petitioner further avers that on, to wit, December 9, 1899, said Oberlin M. Carter, together with Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, and Michael A. Connolly, was indicted in the United States district court for the southern district of Georgia for a conspiracy to defraud the United States of America, copy of which indictment is attached to this amendment and made a part hereof; that said indictment was based on the same facts as set out in the charges and specifications, for the conviction of which by said court-martial said Carter is now undergoing imprisonment—that is to say, charge I, specification 2; charge II, specification 6; charge III, specification 2, and charge IV, specification 1, as set out in the petition filed herein—and that said indictment was found after the circuit court of the United States for the southern district of New York had denied the application for a writ of *habeas corpus,* on October 20, 1899, mentioned in the petition herein.

FRANK P. BLAIR,
Attorney for Petitioner.

I. STANTON CARTER.

41 UNITED STATES OF AMERICA, *Northern District of Illinois, Northern Division,* } *ss:*

I. Stanton Carter, being duly sworn, upon his oath deposes and says that he has read the foregoing amendment subscribed by him and knows the contents thereof, and that the same is true.

I. STANTON CARTER.

Subscribed and sworn to before me this 24th day of October, 1900.

S. W. BURNHAM,
[SEAL.] *Clerk U. S. Circuit Court, Nor. Dist. of Ill.*

Leave to file this amendment is hereby granted.

A. M. THAYER,
Circuit Judge.

Endorsed: No. 7849. Amendment to petition. Filed Nov. 5, 1900. Geo. F. Sharitt, clerk.

42 UNITED STATES OF AMERICA, }
Eastern Division, Southern District of Georgia. }

United States District Court, November Term, 1899.

The grand jurors of the United States chosen, selected, impaneled, and sworn in and for the eastern division of the southern district of Georgia upon their oaths present:

First count. That heretofore, to wit, on the first day of January, in the year of our Lord one thousand eight hundred and ninety-seven, Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally, and Oberlin M. Carter, being evil-disposed persons, all late of said division and district, did, within said division and district and within the jurisdiction of this court, unlawfully, knowingly, and feloniously amongst themselves and with divers other persons to the grand jurors aforesaid unknown, conspire, confederate, and agree together to defraud the United States of America of divers large sums of money by means of a certain fraudulent scheme devised by said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally, and Oberlin M. Carter, and which was then and there in process of execution by them; that said fraudulent scheme was first devised, concocted, and put in operation in said southern district of Georgia by and between the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally, and Oberlin M. Carter on or about the year of our Lord one thousand eight hundred and ninety-one, and has been continuously in process of execution in said southern district of Georgia by and between said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally, and Oberlin M. Carter from about the said year eighteen hundred and ninety-one until on or about the first day of October, in the year of our Lord eighteen hundred and ninety-nine.

That the said Oberlin M. Carter was an officer of the United States Army, in the Corps of Engineers, and had been continuously from about the year of our Lord eighteen hundred and eighty-eight until about the twentieth day of July, in the year of our Lord
43 eighteen hundred and ninety-seven, as such engineer officer in local charge in said southern district of Georgia of what is usually called the "Savannah district" for the improvement by the

United States of rivers and harbors, and as such officer he was engaged in and about the execution of such river and harbor improvements as were made in said Savannah district within the southern judicial district of Georgia during such period, and as such officer in charge of said Savannah district he was vested with sundry powers, duties, and discretion during said period, and, amongst other things, with power, duty, and discretion in proposing, from time to time, projects for the improvement of the rivers and harbors in said district; with power, duty, and discretion in devising and drafting, from time to time, specifications for contracts for the improvements proposed to be made in said district, and with power, duty, and discretion in from time to time drafting and suggesting forms of advertisements for giving notice to the public that competitive bids would be received by him for the construction of such proposed works, and with power, duty, and large discretion in causing to be fixed and fixing the time such advertisements would be published prior to the opening of bids, and with power, duty, and discretion in suggesting and causing to be fixed and fixing the time designated in specifications for contracts within which the successful bidder would be required to commence work, and with power, duty, and discretion in giving out information in regard to such contracts to be let, and with power, duty, and discretion in receiving proposals for and recommending the awarding of such contracts, and with power, duty, and discretion in approving or rejecting the bonds required to be given by such contractors, and with power, duty, and discretion in superintending the work to be done by such contractors in said district and of approving and accepting or rejecting the work done by such contractors according as the same was in accordance with the requirements of such contracts or not, and with power, duty, and discretion in suggesting and approving modifications of such contracts, and with power, duty, and discretion in approving or rejecting the accounts rendered to him by such contractors for work done or claimed by such contractors to be done by them
44 according as said accounts should be fair and honest or false and fraudulent, and when in funds, as a disbursing officer, he was vested with power, duty, and discretion in paying such contractors or refusing to pay such contractors the amounts claimed by them to be due them for work done according as such claims were honest and fair or false and fraudulent.

That the said fraudulent scheme contemplated—

That the said Oberlin M. Carter should, as such engineer officer of the United States so in charge of said Savannah district, so fraudulently exercise the said powers of his office and the said discretion so vested in him that competition in the bidding for such contracts to be let by the United States through him should be cut off, and that the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally, and Oberlin M. Carter, in the name of some one of them or some other person or corporation for their benefit, would be the only real bidders for such contract work in said district, and that all contracts which were from time to time let for the improvements of the rivers and harbors in

said Savannah district would be obtained by some one of said conspirators or by and in the name of some other person or corporation, but secretly for the benefit of said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally, and Oberlin M. Carter, and so that the said works in said district put out to be done for the United States on contract would be let at high and exorbitant cost to the United States of America, and that the said Oberlin M. Carter, as such engineer officer of the United States in charge of said Savannah district, should with fraudulent intent so devise and draft the specifications of contracts for constructing jetty works and training walls to be from time to time let by the United States in said district through him as to provide that the engineer in charge, as aforesaid, might, at his option, require to be put in the work by the contractor a large number of square yards of one specified design of what is usually called a log and brush mattress to be paid for by the United States to the contractor by the square yard, which design of mattress if so required to be put in by the engineer would make the cost of the fulfilling of the contract comparatively very great and expensive to the
45 contractor, and which specifications should further provide that the engineer in charge, as aforesaid, might, at his option, and at the same price per square yard to be paid by the United States to the contractor, in lieu of the use of said design of log and brush mattress of expensive construction, as aforesaid, require to be placed in the works by the contractor the same number of square yards of another specified design of what is usually called a brush mattress of much cheaper cost comparatively to the contractor when placed in the works and of very much less value to the United States, and that the description of the said design of mattress of cheaper cost to the contractor, as aforesaid, should be so vaguely set forth in the specifications that the same could easily by a fraudulent and strained construction of said description be made to apparently cover the acceptance and approval by said engineer in charge, as aforesaid, of large numbers of square yards of mattresses to be furnished by the contractor of a construction of brush mattresses of very much cheaper cost to the contractor furnishing the same and of very much less value to the United States than would be the same number of square yards of the log and brush mattresses of the other design of mattress which might under the specifications be called for by the engineer, as aforesaid, and that said specifications should be so devised and drafted, as aforesaid, by said Oberlin M. Carter in order that all persons not parties to said fraudulent scheme should be kept in ignorance until after the bids were all in, which design of mattress mentioned in the specifications the engineer in charge would require to be put in the works, and so that bidders not a party to said fraudulent scheme would be compelled to put in bids based on the design of mattress of the most expensive and costly construction mentioned in the specifications, while the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally, and Oberlin M. Carter would be advised before the putting in and opening of bids that the said

Oberlin M. Carter, engineer in charge, would, if they or some one for them were the successful bidder-, only require to be put in the works under such contract mattresses made on the very cheapest design, and that design construed by
46 him, in the superintending, approving, and accepting of said works, most strongly against the United States and most liberally in favor of the contractor, with the intent that the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally, and Oberlin M. Carter or some one of them or some persons or corporation acting secretly for their benefit would always be the successful bidders for such contract work at the very lowest cost to the contractor and at the very highest cost to the United States for the material put in consistent with keeping the fraud concealed, and that the said Oberlin M. Carter, as such engineer officer of the United States in charge of said Savannah district, should, with fraudulent intent, so devise and draft the specifications of contracts for jetty works, training walls, and river and harbor improvements to be from time to time let by the United States in said district through him as to require from the successful bidder for such contract work the furnishing at one price per unit of work and material of several types of such work and material largely varying in cost to the contractor and reserving by the provisions of the specifications the option to the said engineer officer in charge the determination, after the letting of said contract, which type of such work and material should be used, but that said Oberlin M. Carter, engineer in charge, would, prior to the time of opening bids for such contract work, secretly inform the said other parties to said fraudulent scheme that he would only require the cheapest type of such material and work to be put in under such contract, with intent to fraudulently enable the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally, and Oberlin M. Carter, or some of them, or some person or corporation for their benefit, to obtain such contract at the least cost to themselves and greatest cost to the United States for the value of the work and material furnished and with the fraudulent intent that if the successful bidder should be some person not a party to said fraudulent scheme the said engineer officer in charge would require from said contractor for such work the furnishing of that type of such work and material specified in the contract most costly to the contractor, and that said engineer officer in charge, with
47 fraudulent intent, would in such case give the specifications such rigid and unfair construction against the interest of such contractor that the performance of such contract would be ruinous to such contractor, and thus further competition with the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally, and Oberlin M. Carter for the obtaining of similar contract work would be thereafter effectually shut off, and that the said Oberlin M. Carter, as such engineer officer of the United States in charge of said Savannah district, with fraudulent intent, should in the actual construction of the work done under such contracts obtained by said Benjamin D. Greene, John F.

Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally, and Oberlin M. Carter, or by one of them, or in the name of some person or corporation secretly for their benefit, so change the quantities and type of material and work required to be furnished by the contractor from the quantities and type of material and work used in the specifications to canvass for bids for such contracts as would ensu-e the contractors the maximum profit in such contract work at the least cost to the contractors, even though such change should give the United States work and material of much less value to the United States, and that said Oberlin M. Carter, as such engineer officer of the United States in charge of said Savannah district, should, when some person other than the said parties to said fraudulent scheme was the lowest bidder at the letting of such contract work, and one of said conspirators, or some one for their benefit, was a higher bidder for such contract work, recommend the rejection of such lowest bid for any slight defect in the proposal, while in similar instances, when it should become necessary for said conspirators to put in at the last minute a second bid to meet unanticipated competition at the letting of such contract work, said engineer officer would knowingly and corruptly approve for acceptance their proposals and guaranties known to him to be forgeries, and that said Oberlin M. Carter, as such engineer officer of the United States in charge of said Savannah district, should knowingly and fraudulently approve for payment accounts which should be so fraudulently rendered to him as such engineer officer in charge,

48 as aforesaid, by said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally, and Oberlin M. Carter, or by some one of them, or by and in the name of the person or corporation which should, by the successful operation of such fraudulent scheme, have obtained such contracts for the secret benefit of the said conspirators aforesaid, and which accounts should be so rendered, as aforesaid, for such inferior work and material to be put in on such works, as aforesaid, at the exorbitant and fraudulent prices stated in such contracts, so fraudulently to be made by said Oberlin M. Carter, as such engineer officer in charge, as aforesaid, with said conspirators or some person or corporation for them, as aforesaid, and that said Oberlin M. Carter, as such engineer officer in charge of said Savannah district, as aforesaid, would, when in funds as a disbursing officer, fraudulently pay over to the said conspirators, or to some one of them, or some person or corporation for their benefit, the amounts of money for which said accounts so rendered should be by said Oberlin M. Carter, as such engineer officer in charge, so approved, and that said conspirators should divide between them and appropriate to their own use said moneys so fraudulently to be obtained, and that said fraudulent scheme contemplated that the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally, and Oberlin M. Carter would use some one or more or all of said means and devises aforesaid, and such other and additional devises as might become necessary, for the accomplishment of the general fraudulent design of the scheme hereinbefore set forth.

And that on the first day of January, in the year of our Lord eighteen hundred and ninety-seven, the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally, and Oberlin M. Carter were proceeding with the construction of certain works in said eastern division of the southern district of Georgia under two contracts, which contracts had been prior to that times, to wit, on the eighth day of October, eighteen hundred and ninety-six, obtained by the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally, and Oberlin M. Carter, for their secret benefit, in the name of the Atlantic Contracting Company, a corporation organized in the year eighteen hundred and ninety-two under the laws
49 of the State of West Virginia, and of which corporation the said Benjamin D. Greene, John F. Gaynor, and William T. Gaynor held all the shares of stock at the date of its charter, except stock of the par value of fifty dollars, and which contracts had been so obtained fraudulently from the United States by means of said fraudulent scheme and devices hereinbefore set forth through the said Oberlin M. Carter, engineer officer in charge of Savannah district, as aforesaid, and one of which said contracts was for the construction of jetties at Cumberland sound, within the said eastern division of the southern district of Georgia, and the other of said contracts was for the construction of training walls and improving the harbor of Savannah within the said eastern division of the southern district of Georgia, and the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally, and Oberlin M. Carter, on the said first day of January, eighteen hundred and ninety-seven, in the said eastern division of the southern district of Georgia, then and there unlawfully, knowingly, and feloniously amongst themselves and with said divers other persons to the grand jurors aforesaid unknown, did band, conspire, confederate, and agree together, as aforesaid, to defraud the United States of said divers large sums of money hereinbefore mentioned by means of applying said fraudulent scheme in and to the execution and completion of the work under said contracts so made on the eighth day of October, eighteen hundred and ninety-six, as aforesaid, and in the obtaining of the money for the fraudulent accounts which should be rendered under said contracts to said Oberlin M. Carter, as such engineer officer, as aforesaid, and generally to carry said fraudulent scheme into execution in the obtaining of all contracts of like character which might thereafter be let in said Savannah district by the United States through the said Oberlin M. Carter, as such engineer officer, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the said United States.

Second count. And the grand jurors aforesaid upon their oaths aforesaid do further present that, in pursuance of said conspiracy in the above count of this indictment set forth, the said Michael
50 A. Connally did, within the said eastern division of the southern district of Georgia and within the jurisdiction of said court, afterwards, to wit, on the seventeenth day of March,

A. D. 1897, then and there assists the said Oberlin M. Carter in the preparation of a certain document purporting to be articles of agreement entered into on the seventeenth day of March, A. D. 1897, between Oberlin M. Carter, Corps of Engineers, U. S. Army, of the first part, and the Atlantic Contracting Company of New York city, N. Y., of the second part, and which purports to modify the contract entered into by and between the Atlantic Contracting Company and said Oberlin M. Carter, captain, Corps of Engineers, for the United States, made on the eighth day of October, A. D. 1896, for work at the entrance of Cumberland sound, Georgia, which contract is mentioned in the above preceding count of this indictment, and which document so made on the seventeenth day of March, A. D. 1897, as aforesaid, purports to be signed by O. M. Carter, capt., Corps of Eng'rs, U. S. A., and by the Atlantic Contracting Company, John F. Gaynor, president, and by William T. Gaynor, secretary, and upon which the name of said Miach-el A. Connally appears as a witness, and he, the said Michael A. Connally, did then and there forge the name of said William T. Gaynor, secretary, so purporting to be signed to said document, and he, the said Michael A. Connally, did likewise then and there assist the said Oberlin M. Carter in the preparation of a document purporting to be dated the eighteenth day of March, A. D. 1897, and purporting to be the written consent of Anson M. Bangs and Eugene Hughes to the modified agreement dated March 17, 1897, above described, and he, the said Michael A. Connally, did then and there forge the said signatures of Anson M. Bangs and Eugene Hughes, signed to said document purporting to be such assent of said sureties, and did then and there forge the signatures of James C. Bogart and Henry Smith, which signatures purport to be signed on said document as witnessing the signatures of said Anson M. Bangs and Eugene Hughes to said document, and that he, the said Oberlin M. Carter, did then and there knowingly cause said forged documents to be then and there forwarded to the War Department of the United States for approval, contrary to the form of the statute in such case
51 made and provided and against the peace and dignity of the said United States.

Third count. And the grand jurors aforesaid upon their oaths aforesaid do further present that, in pursuance of said conspiracy in the first count of this indictment mentioned, within said eastern division of the southern district of Georgia and within the jurisdiction of this court, afterwards, to wit, on the first day of July, in the year of our Lord eighteen hundred and ninety-seven, the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally, and Oberlin M. Carter did cause to be presented to the said Oberlin M. Carter, then and there an officer in the military service of the United States, to wit, captain in the Corps of Engineers, in charge of the Savannah district aforesaid, for approval, a certain claim against the United States, they, the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally, and Oberlin M. Carter, then and there

well knowing said claim to be fraudulent, and which said claim was then and there in the words and figures following, to wit:

SAVANNAH, GA., *July* 1, 1897.

The United States Engineer Department to the Atlantic Contracting Company, Dr.

To labor and material furnished during the month of January, 1897, under formal written contract dated October 8, 1896, on work of improving harbor at Savannah, Georgia, as follows:

31,724.23 square yards of brush mattresses at $0.95.....	$30,138.02
2,297.86 cubic yards of fourth-class stone at $2.75.....	6,319.11
	36,457.13
Less 10 per cent. retained..	3,645.71
Amount due	32,811.42

Submitted by—

THE ATLANTIC CONTRACTING COMPANY,
By EDWARD H. GAYNOR, *Treasurer.*

contrary to the form of the statute in such case made and provided and against the peace and dignity of the said United States.

Fourth count. And the grand jurors aforesaid upon their oaths aforesaid do further present that, in pursuance of said conspiracy in the first count of this indictment mentioned, afterwards, to
52. wit, on the sixth day of July, in the year of our Lord eighteen hundred and ninety-seven, in the southern district of the State of New York and within the jurisdiction of this court, the said Oberlin M. Carter, as such engineer officer in charge of the Savannah district as aforesaid, did then and there issue to the said Atlantic Contracting Company a certain check signed by said Oberlin M. Carter as captain, Corps of Engineers, United States Army, drawn on the assistant treasurer of the United States, New York, and payable to the order of the Atlantic Contracting Company, for the sum of three hundred and forty-five thousand dollars for contract work, improving Cumberland sound, Georgia, and did then and there deliver the said check to the said John F. Gaynor in payment of a claim of the said Atlantic Contracting Company for the sum of three hundred and forty-five thousand dollars for work claimed to have been done by the said Atlantic Contracting Company in the improvement of Cumberland sound under said contract of October 8, 1896, in the first count of this indictment mentioned, which claim he, the said Oberlin M. Carter, then and there knew to be fraudulent, and which said check was then and there in the words and figures following, to wit:

War. U. S. ENG'R OFFICE, Engineers.
SAVANNAH, GA., *July* 6, 1897.

No. 270,537. C. Assistant treasurer of the U. S., New York,

State object for which drawn: Contract work, improving Cumberland sound, Ga.

Pay to the order of the Atlantic Contracting Co. three hundred and forty-five thousand $^{00}_{100}$ dollars ($345,000.00).

O. M. CARTER,
Capt. Corps of Eng'r-, U. S. A.,
Engineer, U. S. A.

contrary to the form of the statute in such case made and provided and against the peace and dignity of the said United States.

Fifth count. And the grand jurors aforesaid upon their oaths aforesaid do further present that, in pursuance of said conspiracy in the first count of this indictment mentioned, afterwards, to wit, on the sixth day of July, in the year of our Lord eighteen hundred and ninety-seven, in the southern district of the State of New
53 York and within the jurisdiction of this court, the said Oberlin M. Carter, as such engineer officer in charge of the Savannah district, as aforesaid, did then and there issue to the said Atlantic Contracting Company a certain check, signed by said Oberlin M. Carter, as captain, Corps of Engineers, United States Army, drawn on the assistant treasurer of the United States, New York, and payable to the order of the Atlantic Contracting Company, for the sum of two hundred and thirty thousand seven hundred and forty-nine dollars and ninety cents, for contract work, improving Savannah harbor, Georgia, and did then and there deliver the said check to the said John F. Gaynor in payment of a claim of the said Atlantic Contracting Company for the sum of two hundred and thirty thousand seven hundred and forty-nine dollars and ninety cents for work claimed to have been done by the said Atlantic Contracting Company in the improvement of Savannah harbor, Georgia, under said contract of October 8, 1896, in the first count of this indictment mentioned, which claim he, the said Oberlin M. Carter, then and there knew to be fraudulent, and which said check was then and there in the words and figures following, to wit:

War. U. S. ENG'R OFFICE, Engineers.
SAVANNAH, GA., *July* 6, 1897.

No. 270,536. B. Assistant treasurer of the U. S., New York,

State object for which drawn: Contract work, improving Savannah harbor, Ga.

Pay to the order of the Atlantic Contracting Co. two hundred and thirty thousand seven hundred and forty-nine $^{00}_{100}$ dollars ($230,749.00).

O. M. CARTER,
Capt., Corps Eng., U. S. A.,
Engineer, U. S. A.

contrary to the form of the statute in such case made and provided and against the peace and dignity of the said United States.

Sixth count. And the grand jurors aforesaid upon their oaths aforesaid do further present that on the said first day of January, in the year of our Lord one thousand eight hundred and ninety-seven, the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally, and Oberlin M. Carter, being evil-disposed persons, all late of said division and district, did, within said division and district and
54 within the jurisdiction of this court, unlawfully, knowingly, and feloniously, amongst themselves and with divers other persons to the grand jurors aforesaid unknown, band, conspire, confederate, and agree together to defraud the United States of America of divers large sums of money by means of a certain fraudulent scheme devised by the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally, and Oberlin M. Carter; that the said Oberlin M. Carter was on the day and year aforesaid an officer of the United States Army, in the Corps of Engineers, and was then and there, as such engineer officer, in local charge in said southern district of Georgia of what is usually called the Savannah district for the improvement by the United States of rivers and harbors, and as such officer he was then and there engaged in and about the execution of such river and harbor improvements as were being made and to be made in said Savannah district, within the said southern judicial district of Georgia, and as such engineer officer in charge of said Savannah district, as aforesaid, he was vested with the usual powers, duties, and discretion of engineer officers of the United States in charge of river and harbor improvement districts, and that the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally, and Oberlin M. Carter then and there did band, conspire, confederate, and agree together, as aforesaid, that the said Oberlin M. Carter, as such engineer officer of the United States so in charge of said Savannah district, should so fraudulently exercise said powers, duties, and discretion of the said office of engineer in charge of said district that the competition provided for by law in the bidding for such contracts to be let for the United States through said engineer officer for the construction of the public improvements of the United States in the said Savannah district should be cut off, and that the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally, and Oberlin M. Carter, in the name of some one of them or of some other person or corporation for their benefit, would be the only real bidders for such contract work in said district, and that all such contracts which were from time to time let for the improvements of
55 the rivers and harbors of said Savannah district would be so fraudulently and corruptly obtained by some one or other of said conspirators, or by and in the name of some other person or corporation, but secretly for the benefit of said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally, and Oberlin M. Carter, at high and exorbitant cost to

the United States for the work to be done and material to be furnished, and that the said Oberlin M. Carter would so devise, suggest, and inaugurate projects for the improvements of the rivers and harbors in said district and so devise and draft the specifications for work and contracts to be let for such improvements and so superintend the execution of such works, contracts for which should have been obtained by the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally, and Oberlin M. Carter, or by some one of them, or in the name of some other person or corporation secretly for their benefit, that large amounts of unnecessary and useless work should fraudulently be undertaken and done under such contracts for the United States by such contractors on such contracts, and that in the execution of all contracts for improvements made in said district for the United States through the said Oberlin M. Carter, as such officer in charge, he, the said Oberlin M. Carter, as such engineer officer in charge, would exercise the powers, duties, and discretion of his office fraudulently and corruptly in favor of the contractor on such of said contracts as might be so obtained by the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally, and Oberlin M. Carter, or by some one of them or other person or corporation for their secret benefit, as aforesaid, and that the said Oberlin M. Carter would so falsely and fraudulently exercise the powers, duties, and discretion of his office in the approval and acceptance of the work so fraudulently done under such contracts so let and executed for the said public works so constructed by the Government of the United States in said district under and through the said Oberlin M. Carter, as engineer officer in charge, that said contractors would receive payment for the construction of such works under such contract at high and exorbitant rates for the poorest and cheapest
56 class of material and work put in under said contracts at least cost to such contractors, contrary to the form of the statute in such case made and provided and against the peace and dignity of the said United States.

Seventh count. And the grand jurors aforesaid upon their oaths aforesaid do further present that, in pursuance of said conspiracy in the last preceding count of this indictment set forth, the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally, and Oberlin M. Carter, afterwards, to wit, on the first day of July, in the year of our Lord eighteen hundred and ninety-seven, within said division and district, did then and there knowingly, wilfully, and feloniously cause to be presented to the said Oberlin M. Carter, then and there as such engineer officer in charge of said Savannah district, for approval and payment, a claim against the Government of the United States for the sum of three hundred and forty-five thousand dollars for labor, material, and supplies so claimed to have been furnished the United States of America during the months of December, 1896, January, 1897, February, 1897, March, 1897, April, 1897, May, 1897, and June, 1897, on work of improving Cumberland sound, Georgia, within said southern district of Georgia, under a formal written contract

dated October 8, 1896, they, the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally, and Oberlin M. Carter, then and there well knowing said claim to be fraudulent, contrary to the form of the statute in such case made and provided and against the peace and dignity of the said United States.

Eighth count. And the grand jurors aforesaid and upon their oaths aforesaid do further present that, in pursuance of said conspiracy in the last but one preceding count in this indictment mentioned, afterwards, to wit, on the sixth day of June, in the year of our Lord eighteen hundred and ninety-seven, in the southern district of the State of New York and within the jurisdiction of this court, the said Oberlin M. Carter, as such engineer officer in charge of the Savannah district, as aforesaid, did then and there issue to the said Atlantic Contracting Company a certain check signed by said Oberlin M. Carter, as captain of engineers, United States
57 Army, drawn on the assistant treasurer of the United States, New York, and payable to the order of the Atlantic Contracting Company, for the sum of three hundred and forty-five thousand dollars, for contract work, improving Cumberland sound, Georgia, and did then and there deliver the said check to the said John F. Gaynor in payment of a claim of the said Atlantic Contracting Company for the sum of three hundred and forty-five thousand dollars for work claimed to have been done by the said Atlantic Contracting Company in the improvement of Cumberland sound under said contract of October 8, 1896, in the last preceding count of this indictment mentioned, which claim he, the said Oberlin M. Carter, then and there knew to be fraudulent, and which said check was then and there in the words and figures following, to wit:

War. U. S. Eng'r Office, Engineers.
Savannah, Ga., *July* 6, 1897.

No. 270,537. Assistant treasurer of the U. S.,
C. New York,

State object for which drawn: Contract work and improving Cumberland —, Ga.

Pay to the order of the Atlantic Contracting Co. three hundred and forty-five thousand $^{00}_{100}$ dollars.

O. M. CARTER,
Capt. Corps of Eng'r-, U. S. A.,
Engineer, U. S. A.

contrary to the form of the statute in such case made and provided and against the peace and dignity of the said United States.

Ninth count. And the grand jurors aforesaid upon their oaths aforesaid do further present that on the said first day of July, in the year of our Lord eighteen hundred and ninety-seven, within the eastern division of the southern district of Georgia and within the jurisdiction of this court, the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally, and Oberlin M. Carter, did then and there unlawfully, know-

ingly, wilfully, and feloniously, amongst themselves and with divers other persons to the grand jurors aforesaid unknown, combine, conspire, confederate, and agree together to defraud the Government of the United States by obtaining the allowance and payment by the United States, through the said Oberlin M. Carter, he, the said Oberlin M. Carter, being then and there a captain in the Corps of Engineers of the United States Army, and as such captain in the Corps of Engi-
58 neers being then and there engaged in the work of improving for the Government the rivers and harbors of what is usually known as the "Savannah district" for the improvement of rivers and harbors, and he, the said Oberlin M. Carter, being then and there in the military service of the United States, and as such captain in the Corps of Engineers being then and there a disbursing officer of the United States entrusted with the disbursement of money applicable to such improvements in said Savannah district, of a certain fraudulent claim, and which said fraudulent claim was then and there a claim for labor and material claimed to have been furnished by the Atlantic Contracting Company, a corporation chartered under the laws of the State of West Virginia, under a contract theretofore entered into on the 8th day of October, A. D. 1896, for improving Cumberland sound, within the State of Georgia, and which contract had been entered into between the said Atlantic Contracting Company and the said Oberlin M. Carter, as captain in the Corps of Engineers of the United States —, as aforesaid, and which said fraudulent claim was for the sum of three hundred and forty-five thousand dollars for work, labor, and supplies claimed to have been furnished to the United States by said Atlantic Contracting Company for said work at Cumberland sound during the months of December, 1896, January, 1897, February, 1897, March, 1897, April 1897, May, 1897, and June, 1897. And the grand jurors aforesaid upon their oaths aforesaid do further present that the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally, and Oberlin M. Carter, afterwards, to wit, on the first day of July, in the year of our Lord eighteen hundred and ninety-seven, in furtherance of and according to the said conspiracy, combination, confederacy, and agreement amongst themselves had, as aforesaid, did unlawfully and fraudulently cause to be presented to the said Oberlin M. Carter, as such officer and then and there in the military service of the United States, as aforesaid, a certain claim against the Government of the United States, they, the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally, and Oberlin M. Carter, well knowing that said claim was fraudulent, for the purpose of obtaining the approval and
59 payment of said claim by the said Oberlin M. Carter, as such captain in the Corps of Engineers of the United States Army in charge of said Savannah district, as aforesaid, and which said fraudulent claim was then and there in the words and figures following, to wit:

SAVANNAH, GA., *July* 1, 1897.

The United States Engineer Department to the Atlantic Contracting Company, Dr.

To labor and material furnished during the month of December, 1896, on work of improving Cumberland sound, Georgia, under formal written contract dated October 8, 1896, as follows:

18,727.34 square yards of mattresses at $1.10.....	$20,600.07
1,968.06 cubic yards of third-class stone at $3.90.....	7,675.43
	28,275.50
Less 10 per cent. retained.....	2,827.55
Amount due.....	25,447.95

Submitted by—

THE ATLANTIC CONTRACTING COMPANY,
By EDWARD H. GAYNOR, *Treasurer.*

contrary to the form of the statute in such case made and provided and against the peace and dignity of the said United States.

Tenth count. And the said grand jurors aforesaid upon their oaths aforesaid do further present that on the first day of July, in the year of our Lord eighteen hundred and ninety-seven, within the eastern division of the southern district of Georgia and within the jurisdiction of this court, the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally, and Oberlin M. Carter did then and there unlawfully, knowingly, wilfully, and feloniously, amongst themselves and with divers other persons to the grand jurors aforesaid unknown, combine, conspire, confederate, and agree together to defraud the Government of the United States by obtaining the allowance and payment by the United States through the said Oberlin M. Carter, he, the said Oberlin M. Carter, being then and there a captain in the Corps of Engineers of the United States Army, and as such captain in the Corps of Engineers being then and there engaged in the work of improving for the Government the rivers and harbors of what is usually known
60 as the "Savannah district" for the improvement of rivers and harbors, and he, the said Oberlin M. Carter, being then and there in the military service of the United States, and as such captain in the Corps of Engineers being then and there a disbursing officer of the United States entrusted with the disbursement of money applicable to such improvements in said Savannah district, of a certain fraudulent claim, and which said fraudulent claim was then and there a claim for labor and material claimed to have been furnished by the Atlantic Contracting Company, a corporation chartered under the laws of the State of West Virginia, under a contract theretofore entered into on the 8th day of October, A. D. 1896, for improving harbor at Savannah, within the State of Georgia, and which contract had been entered into between the said Atlantic Contracting Company and the said Oberlin M. Carter, as captain in

the Corps of Engineers of the United States —, as aforesaid, and which said fraudulent claim was for the sum of two hundred and thirty thousand seven hundred and forty-nine dollars and ninety cents for work, labor, and supplies claimed to have been furnished to the United States by said Atlantic Contracting Company for said work at said harbor during the months of December, 1896, January, 1897, February, 1897, March, 1897, April, 1897, May, 1897, and June, 1897.

And the grand jurors aforesaid upon their oaths aforesaid do further present that the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally, and Oberlin M. Carter afterwards, to wit, on the first day of July, in the year of our Lord eighteen hundred and ninety-seven, in furtherance of and according to the said conspiracy, combination, confederacy, and agreement amongst themselves had as aforesaid, did unlawfully and fraudulently cause to be presented to the said Oberlin M. Carter, as such officer and then and there in the military service of the United States, as aforesaid, a certain claim against the Government of the United States, they, the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally, and Oberlin M. Carter, well knowing that said claim was fraudulent, for the purpose of obtaining the approval and payment of said claim by the said Oberlin M. Carter as such captain in the Corps of Engineers of the United States Army in charge of said Savannah district, as aforesaid, and which said fraudulent claim was then and there in the words and figures following, to wit:

61 SAVANNAH, GA., *July* 1, 1897.

The United States Engineer Department to the Atlantic Contracting Company, Dr.

To labor and material furnished during the month of February, 1897, under formal written contract dated October 8, 1896, on work of improving harbor at Savannah, Georgia, as follows:

23,151.66 square yards of mattresses at $0.95	$21,994.08
1,544 cubic yards of fourth-class stone at $2.75	4,248.72
	26,242.80
Less 10 per cent. retained	2,624.28
Amount due	23,618.52

Submitted by—

THE ATLANTIC CONTRACTING COMPANY,
By EDWARD H. GAYNOR, *Treasurer.*

contrary to the form of the statute in such case made and provided and against the peace and dignity of the said United States.

MARION ERWIN,
United States District Attorney.

A true bill.

THOMAS S. McKEE, *Foreman.*

Dec. 8th, 1899.

(Indorsed:) No. 322. United States district court, eastern division, southern district of Georgia. United States *v.* Benjamin D. Greene *et al.* Indictment for conspiracy, etc. Filed Dec. 8, 1899. S. F. B. Gillespie, deputy clerk. Certified copy of original. Marion Erwin, U. S. attorney. No. 7849. Filed Nov. 5, 1900. Geo. F. Sharitt, clerk.

62 To the honorable the circuit court of the United States for the district of Kansas:

The undersigned, Robert W. McClaughry, warden of the United States penitentiary at Fort Leavenworth, Kansas, respectfully makes return to the writ, a copy of which is hereto annexed, marked "½ A," and says that he has the custody of the body of Oberlin M. Carter as the warden of the said penitentiary, and that he detains the said Carter by virtue of the directions of the Secretary of War, the said Carter being under sentence of a general court-martial, sentenced to be imprisoned at said United States penitentiary at Fort Leavenworth, Kansas, for five years, and that the said Carter is now in custody as aforesaid, undergoing said sentence of imprisonment, and your respondent says he is acting in this capacity as custodian of said Carter by virtue of general orders No. 172, headquarters of the army, adjutant general's office, Washington, D. C., September 29, 1899, the same containing the charges and specifications under and by virtue of which said Carter was tried, the findings of the general court-martial, the sentence of the said Carter by the same, the approval of the findings of said court-martial, with the exceptions stated in such orders by the Secretary of War, the approval of the sentence by the latter, and the approval and confirmation by the President; and your respondent respectfully calls attention to said general orders, a duly authenticated copy of which, marked "A," is filed herewith; and the attention of the court is respectfully invited thereto, the contention of respondent being that the said Carter has been lawfully convicted and sentenced by the said general court-martial, which had jurisdiction of the person of the said Carter and of the various offences for which he was tried.

Your respondent begs leave further to represent that on the second day of October, 1899, Abram J. Rose, the attorney for the said Carter, on behalf of the said Carter, obtained from the circuit court of the United States for the southern district of New York a writ of *habeas corpus*, commanding Captain Benjamin K. Roberts to have the body of the said Carter, together with the time and cause
63 of his imprisonment and detention, before the said court on the fourth day of October, 1899; that upon the return of said writ the body of the said Carter was produced before the said court, and return was made showing that the said Carter was detained in custody by authority of general orders No. 172, of September 29, 1899, being the orders hereinbefore cited as the cause and authority of the present detention, by authority of which said general orders the respondent made return that the said Carter was not unlawfully detained, and prayed for dismissal of the writ; that during the pendency of said *habeas corpus* before the said circuit court the said Carter

paid the fine provided for in the said petition; that after due hearing the said circuit court dismissed the said writ, and the said Carter was remanded to the custody from which he was produced, in conformity to rule thirty-four (see *In re* Carter, 97 Fed. Rep., 496; briefs in the case filed herewith, marked B to E); that thereafter an appeal was filed and a writ of error was granted and issued out of the United States circuit court of appeals for the second circuit upon the said circuit court for the southern district of New York, and the record and proceedings of said cause and all things concerning the same were sent to the said circuit court of appeals on the twentieth day of November, 1899, and the said record and all proceedings thereunder and all things touching the same were duly certified to the said circuit court of appeals as aforesaid; authenticated copy of said transcript filed herewith, marked "F."

That the said case on appeal came on to be heard in the United States circuit court of appeals on the 9th day of January, 1900, before Judges Wallace and Shipman, and on the 24th day of said month said court rendered a decision affirming the judgment of the circuit court below, with costs. (See 99 Fed. Rep., 948; duly authenticated copies of briefs in the case filed herewith, marked G, H, & I.)

That on February 5th, 1900, a petition for a writ of certiorari in the cause to the circuit court of appeals was submitted to the Supreme Court of the United States, which, on February 26th, 1900, was denied. (See Carter *vs.* Roberts, 176 U. S., 684; duly au-
64 thenticated copies of transcript, petition, and briefs filed herewith, marked "J & K.")

That on the same day of the denial of the aforesaid petition, namely, on the 26th day of February, 1900, an appeal was taken to the Supreme Court and a writ of error sued out to review the order of the circuit court dismissing the said *habeas corpus* and remanding the said Carter.

That thereafter in this proceeding the Solicitor General of the United States filed a "motion to dismiss or affirm;" that after a hearing of said motion the Supreme Court, of the 23rd day of April, 1900, dismissed said appeal and writ of error for want of jurisdiction. (See Carter *v.* Roberts, 177 U. S., 496; duly authenticated copies of transcript of record, motion of appellee and defendant in error, and brief of appellant and plaintiff in error filed herewith, marked "L.")

That upon the mandate issuing out of the Supreme Court in this cause, on the 24th day of April, 1900, to the circuit court of the southern district of New York, the said circuit court, on the 25th day of April, 1900, entered judgment accordingly and remanded the said Carter to the custody from which he was produced for the purpose of the execution of the sentence; duly authenticated copies of mandate and judgment filed herewith, marked "M."

And that in accordance with said judgment and sentence the said Carter was received at the said penitentiary on the 27th day of April, 1900, and has been in the said penitentiary until this date of the production of his body before this court undergoing the sentence hereinbefore mentioned.

Your respondent further represents that he objects to the admission by this court of the alleged abstract of evidence claimed to have been taken before the said court-marshal, submitted by the petitioner and made a part of his petition (Exhibit "A"), because—

First. The record of the whole proceedings of a court-martial is required by law to be reduced to writing, and is deposited in the office of the Judge Advocate General of the army. This record itself, or a copy thereof, duly authenticated, as required by section 882, Revised Statutes, is the best evidence, and the alleged abstract is therefore inadmissible.

65–1411 And, second:

Even if the latter was admissible, or a duly authenticated copy of it was presented, it would be wholly inadmissible for the purpose for which it is sought to be introduced, it being a rule of law that in a *habeas corpus* proceeding the court will not examine the evidence for the purpose of determining whether the party should be pronounced innocent of the offenses for which he is imprisoned.

And, third:

This case presents no exceptions justifying the departure from this rule, the record presented with this return affording the information necessary in the case.

In obedience to the said writ of *habeas corpus* the respondent herewith produces before the court the body of the said Oberlin M. Carter, but, for the reasons set forth, prays this honorable court to dismiss the said writ.

ROBERT W. McCLAUGHRY,
Warden United States Penitentiary,
Fort Leavenworth, Kansas.

Leavenworth, Kansas, November 23, 1900.

Endorsed: No. 7849. *In re* Oberlin M. Carter. Petition. Return of warden. Filed Nov. 23, 1900. Geo. F. Sharitt, clerk.

1412 *General Orders No.* 172.

HEADQUARTERS OF THE ARMY,
ADJUTANT GENERAL'S OFFICE,
WASHINGTON, D. C., *September* 29, 1899.

Before a general court-martial which convened at Savannah, Georgia, pursuant to special orders No. 282, of December 2, 1897; special orders No. 306, of December 31, 1897, and special orders No. 1, of January 3, 1898, from headquarters of the army, adjutant general's office, and of which Brigadier General Elwell S. Otis, United States Army, was president, and Colonel Thomas F. Barr, assistant judge advocate general, was judge advocate, was arraigned and tried—

Captain Oberlin M. Carter, Corps of Engineers.

Charge I.—"Conspiring to defraud the United States, in violation of the 60th article of war."

Specification I.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, devising and intending to defraud the United States, and to aid the Atlantic Contracting Company, a corporation, and John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Anson M. Bangs, and divers other persons, all of whom were likewise with him, the said Carter, devising and intending to defraud the United States, did, on or about August 1, 1892, and thereafter to June 6, 1896, with the corporation and persons named, unlawfully combine and conspire to defraud the United States of divers large sums of money by aiding the said corporation and persons to obtain the allowance and payment of certain false and fraudulent claims indicated by the payments hereinafter alleged to have been made; and in pursuance of the said conspiracy the said Captain Oberlin M. Carter, in the months of August and September, 1892, being the officer of the United States in local charge of the river and harbor district usually called the Savannah district, and of the improvement by the United States of rivers and harbors in said district, did, with the knowledge and consent of the said other parties named, so advertise for proposals for contracts for certain works of improvement in Cumberland sound, in said district, and so manage and conduct such advertising and the matter of giving out information in regard to the contract to be let, and the matter of receiving proposals and awarding the contract, as to enable
1413 the said Edward H. Gaynor to secure the contract for said work and to have the same entered into by the United States with him, September 16, 1892; and in further pursuance of the said conspiracy the said Edward H. Gaynor afterwards, to wit, from about the 16th day of September, 1892, to the 25th day of May, 1893, did furnish and put into said work certain mattresses, stone, and other material which were different in kind and character from the mattresses, stone, and other material contracted for in said contract, and very much less costly to the said Edward H. Gaynor, as well as of less value to the United States, which said mattresses, stone, and other material so furnished and put into the work the said Captain Carter, in further pursuance of said conspiracy, did receive and accept and cause to be received and accepted for the United States as and for the mattresses, stone, and other material contracted for, and did cause payments to be made out of the moneys of the United States to the said Edward H. Gaynor on account of the said furnishing and delivery of the same, and as if the said mattresses, stone, and other material had been such as were stipulated for in the contract, and at the same rate, cost, and price as if they had been, as follows, and on or about the dates named: November 17, 1892, $1,713.23; December 16, 1892, $21,102.67; December 31, 1892, $24,529.95; January 5, 1893, $493.59; February 4, 1893, $20,274.07; March 6, 1893, $16,433.14; April 3, 1893, $14,218.86; May 2, 1893, $27,436.06; May 22, 1893, $9,337.85; and May 25, 1893, $26,706.46.

"And in further pursuance of the said conspiracy the said Captain Carter, about August, September, and October, 1892, did advertise for proposals for a contract for improving the harbor at Savannah, Georgia, in said river and harbor district, and did so manage and

conduct the matter of such advertising and the matter of giving out information in regard to the contract to be let, and the matter of receiving proposals and awarding the contract, as to enable the said The Atlantic Contracting Company to secure the contract for said work and to have the same entered into by the United States with it October 22, 1892; and in further pursuance of the said con-
1414 spiracy the said The Atlantic Contracting Company, from about the 22nd day of October, 1892, to the 4th day of May, 1895, did furnish and put into said work certain mattresses, stone, and other material which were different in kind and character from the mattresses, stone, and other material contracted for in said contract and very much less costly to the said The Atlantic Contracting Company as well as of less value to the United States, which said mattresses, stone, and other material so furnished and put into the work, the said Captain Carter, in further pursuance of said conspiracy, did receive and accept and cause to be received and accepted for the United States, as and for the mattresses, stone, and other material contracted for, and did cause payments to be made out of the moneys of the United States, as to the said The Atlantic Contracting Company, on account of the said furnishing and delivery of the same, and as if the said mattresses, stone, and other material had been such as were stipulated for in the contract, and at the same rate, cost, and price as if they had been, as follows, and on or about the dates named: November 17, 1892, $3,265.61; December 3, 1892, $15,000.00; December 16, 1892, $8,507.45; December 31, 1892, $20,000.00; January 10, 1893, $25,416.81; February 4, 1893, $42,722.83; February 8, 1893, $15.71; March 6, 1893, $44,985.47; March 31, 1893, $38,076.11; April 3, 1893, $20,584.51; May 2, 1893, $30,000.00; May 31, 1893, $6,105.69; July 3, 1893, $5,968.18; July 3, 1893, $34,177.94; July 3, 1893, $46,592.39; August 3, 1893, $57,013.64; September 1, 1893, $97,159.99; October 2, 1893, $59,554.84; November 3, 1893, $52,452.22; December 1, 1893, $85,752.28; January 2, 1894, $44,175.02; January 5, 1894, $27,057.00; February 2, 1894, $75,118.71; March 1, 1894, $44,630.22; July 7, 1894, $202,481.40; September 8, 1894, $481,933.67; October 2, 1894, $88,922.63; November 9, 1894, $44,303.92; December 5, 1894, $38,903.72; January 11, 1895, $39,368.67; February 1, 1895, $31,659.28; March 2, 1895, $25,612.62; April 5, 1895, $63,656.50, and May 4, 1895, $19,860.08.

"And in further pursuance of the said conspiracy the said Captain Carter, about January, February, and March, 1893, did advertise for proposals for a contract for improving Jekyl creek, Georgia, in said river and harbor district, and did so manage and conduct the
1415 matter of such advertising and the matter of giving out information in regard to the contract to be let, and the matter of receiving proposals and awarding the contract, as to enable the said The Atlantic Contracting Company to secure the contract for said work, and to have the same entered into by the United States with it, March 1, 1893; and in further pursuance of said conspiracy the said The Atlantic Contracting Company, from about the 1st day of March, 1893, to about the 3d day of July, 1893, did furnish and put into said work certain mattresses, stone, and other material which

were different in kind and character from the mattresses, stone, and other material contracted for in said contract, and very much less costly to the said The Atlantic Contracting Company as well as of less value to the United States; which said mattresses, stone, and other material so furnished and put into the work the said Captain Carter in further pursuance of the conspiracy, did receive and accept, and cause to be received and accepted, for the United States and as and for the mattresses, stone, and other material contracted for, and did cause payments to be made out of the moneys of the United States to the said The Atlantic Contracting Company on account of said furnishing and delivering of the same, and as if the said mattresses, stone, and other material had been such as were stipulated for in the contract, and at the same rate, cost, and price as if they had been, as follows, and on or about the dates named: June 3, 1893, $3,309.40; July 3, 1893, $3,595.38, and July 3, 1893, $14,591.00.

"And in further pursuance of the said conspiracy the said Captain Carter, about August, September, October, and November, 1894, did advertise for proposals for improving Cumberland sound, in said river and harbor district, and did so manage and conduct the matter of such advertising and the matter of giving out information in regard to the contract to be let, and the matter of receiving proposals and awarding the contract, as to enable the said Anson M. Bangs to secure the contract for said work and to have the same entered into by the United States with him, November 15, 1894; and in further pursuance of the said conspiracy the said Anson M. Bangs,
1416 from about the 15th day of November, 1894, to about the 4th day of May, 1895, did furnish and put into said work certain mattresses, stone, and other material which were different in kind and character from the mattresses, stone and other material contracted for in said contract, and very much less costly to the said Anson M. Bangs, as well as of less value to the United States; which said mattresses, stone, and other material so furnished and put into the work, the said Captain Carter, in further pursuance of the conspiracy, did receive and accept, and cause to be received and accepted for the United States as and for the mattresses, stone, and other material contracted for; and did cause payments to be made out of the moneys of the United States to the said Anson M. Bangs, on account of said furnishing and delivery of the same, and as if the said mattresses, stone and other material had been such as were stipulated for in the contract, and at the same rate, cost and price as if they had been, as follows, and on or about the dates named: December 5, 1894, $874.73; January 11, 1895, $9,845.35; February 1, 1895, $17,800.50; March 2, 1895, $21,287.65; April 5, 1895, $29,659.82, and May 4, 1895, $32,059.92.

"And in further pursuance of the said conspiracy the said Captain Carter, about March and April, 1895, did advertise for proposals for improving Altamaha river, Georgia; Darien harbor, Georgia; Jekyl creek, Georgia, and inside water route between Savannah, Georgia, and Ferdinanda, Florida, in said river and harbor district, and did so manage and conduct the matter of such advertising and the matter of giving out information in regard to the contract to be let and the matter of receiving proposals and awarding the contract as

to enable the said William T. Gaynor to secure the contract for said work and to have the same entered into by the United States with him April 20th, 1895, and in further pursuance of said conspiracy the said William T. Gaynor, from about the 20th day of April, 1895, to about the 1st day of July, 1895, did furnish and put into said work certain mattresses, stone, and other material which were different in kind and character from the mattresses, stone, and other material contracted for in said contract, and very much less
1417 costly to the said William T. Gaynor, as well as of less value to the United States; which said mattresses, stone, and other material so furnished and put into the work, the said Captain Carter, in further pursuance of the conspiracy, did receive and accept, and cause to be received and accepted for the United States as and for the mattresses, stone, and other material contracted for; and did cause payments to be made out of the moneys of the United States to the said William T. Gaynor on account of said furnishing and delivery of the same, and as if the said mattresses, stone, and other material had been such as were stipulated for in the contract, and at the same rate, cost, and price as if they had been, as follows, and on or about the dates named: June 4, 1895, $17,728.81, and July 1, 1895, $27,861.32."

Specification II.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, devising and intending to defraud the United States and to aid the Atlantic Contracting Company, a corporation, and John F. Gaynor, William T. Gaynor, and Edward H. Gaynor, and Anson M. Bangs, and divers other persons, all of whom were likewise with him, the said Carter, devising and intending to defraud the United States, did, with the corporation and persons named, unlawfully combine and conspire to defraud the United States of divers large sums of money by aiding the said The Atlantic Contracting Company to obtain the allowance and payment of certain false and fraudulent claims hereinafter described; and in pursuance of the said conspiracy the said Oberlin M. Carter, in the months of June, July, and August, September, and October, 1896, being an officer of the United States in local charge of the river and harbor district usually called the Savannah district, and of the improvement by the United States of rivers and harbors in said district, did, with the knowledge and consent of the said other parties named, so advertise for proposals for contracts for certain works of improvement in the harbor of Savannah, Georgia, in said district, and so manage and conduct said advertising, and the matter of giving out information in regard to the contract to be let, and the matter of receiving proposals and awarding the contract, as to enable the said The Atlantic Contracting Company to secure the con-
1418 tract for said work, and to have the same entered into by the United States with it October 8th, 1896; and in further pursuance of the said conspiracy the said The Atlantic Contracting Company afterwards, to wit, from about the 8th day of October, 1896, to July 31st, 1897, did furnish and put into said work certain mattresses, stone, and other material which were different in kind and character from the mattresses, stone, and other material contracted for in said con-

tract, and very much less costly to the said The Atlantic Contracting Company as well as of less value to the United States; which said mattresses, stone, and other material so furnished and put into the work the said Captain Carter, in further pursuance of said conspiracy, did receive and accept, and cause to be received and accepted, for the United States, as and for the mattresses, stone, and other material contracted for; and did, on or about July 6th, 1897, cause to be paid, out of the moneys of the United States, $230,749.90 to the said The Atlantic Contracting Company on account of the said furnishing and delivery of the same, and as if the said mattresses, stone, and other material had been such as were stipulated for in the contract, and at the same rate, cost, and price as if they had been.

"And in further pursuance of the said conspiracy the said Captain Carter, about June, July, August, September, and October, 1896, did advertise for proposals for a contract for improving Cumberland sound, Georgia, in said river and harbor district, and so manage and conduct the matter of such advertising, and the matter of giving out information in regard to the contract to be let, and the matter of receiving proposals and awarding the contract, as to enable the said The Atlantic Contracting Company to secure the contract for said work and to have the same entered into by the United States with it October 8th, 1896; and in further pursuance of the said conspiracy the said The Atlantic Contracting Company, from about the 8th day of October, 1896, to the 31st day of July, 1897, did furnish and put into said work certain mattresses, stone, and other material which were different in kind and character from the mat-
1419 tresses, stone, and other materials contracted for in said contract, and very much less costly to the said The Atlantic Contracting Company, as well as of less value to the United States; which said mattresses, stone, and other material so furnished and put into the work the said Captain Carter, in further pursuance of said conspiracy, did receive and accept, and cause to be received and accepted, for the United States, as and for the mattresses, stone, and other material contracted for; and did, on or about July 6th, 1897, cause to be paid, out of the moneys of the United States, $345,000.00 to the said The Atlantic Contracting Company, on account of said furnishing and delivery of the same, and as if the said mattresses, stone, and other material had been such as were stipulated for in the contract and at the same rate, cost, and price as if they had been.

"This on the 6th day of June, 1896, and thereafter to the 1st day of August, 1897."

Charge II.—"Causing false and fraudulent claims to be made against the United States, in violation of the 60th article of war."

Specification I.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, being at the time the officer in local charge of river and harbor improvements in the Savannah river and harbor districts, did cause to be made certain false and fraudulent claims against the United States and in favor of Edward H. Gaynor, knowing the same to be false and fraudulent, to wit: The claims represented by the following vouchers, submitted by the said

Captain Carter with his accounts and marked 'Appropriation for improving Cumberland sound, Georgia and Florida':

Voucher No. 18, for $1,713.23, November, 1892;
Voucher No. 13, for $21,102.67, December, 1892;
Voucher No. 20, for $24,529.95, December, 1892;
Voucher No. 26, for $493.59, January, 1893;
Voucher No. 3, for $20,274.07, February, 1893;
Voucher No. 2, for $16,433.14, March, 1893;
Voucher No. 1, for $14,218.86, April, 1893;
Voucher No. 2, for $27,436.06, May, 1893;
Voucher No. 5, for $9,337.85, May, 1893;
Voucher No. 6, for $26,706.46, May, 1893;

1420 which said false and fraudulent claims the said Captain Carter caused so be made, by knowingly permitting Edward H. Gaynor, who had previously entered into a contract, dated September 16, 1892, to furnish to the United States certain mattresses, stone, and other materials of specified kinds and qualities, for constructing works in said river and harbor district, to furnish and put into said works mattresses, stone, and other material different from, inferior to, cheaper, and of less value to the United States than those contracted for, and by receiving and accepting and paying for the same as of the kinds and qualities contracted for, and by falsely certifying to the correctness of the said vouchers, well knowing that the mattresses, stone, and other material charged for in said vouchers as having been furnished had not in fact been furnished, each of the said claims having been made in or about the month named in the above description of the voucher relating to it."

Specification II.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, being at the time the officer in local charge of river and harbor improvements in the Savannah river and harbor districts, did cause to be made certain false and fraudulent claims against the United States and in favor of the Atlantic Contracting Company, a corporation, knowing the same to be false and fraudulent, to wit, the claims represented by the following vouchers submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving harbor at Savannah, Georgia':

Voucher No. 11, $3,265.61, November, 1892;
Voucher No. 2, $15,000.00, December, 1892;
Voucher No. 24, $8,507.45, December, 1892;
Voucher No. 28, $20,000.00, December, 1892;
Voucher No. 3, $25,416.81, January, 1893;
Voucher No. 1, $42,722.83, February, 1893;
Voucher No. 3, $15.71, February, 1893;
Voucher No. 2, $44,985.47, March, 1893;
Voucher No. 8, $38,076.11, March, 1893;
Voucher No. 2, $20,584.51, April, 1893;
Voucher No. 4, $30,000.00, May, 1893;
Voucher No. 28, $6,105.69, May, 1893;

1421 Voucher No. 3, $5,968.18, July, 1893;
Voucher No. 4, $34,177.94, July, 1893;

Voucher No. 5, $46,592.39, July, 1893;
Voucher No. 2, $57,013.64, August, 1893;
Voucher No. 1, $97,159.99, September, 1893;
Voucher No. 1, $59,554.84, October, 1893;
Voucher No. 1, $52,452.22, November, 1893;
Voucher No. 2, $85,752.28, December, 1893;
Voucher No. 1, $44,175.02, January, 1894;
Voucher No. 2, $27,057.00, January, 1894;
Voucher No. 4, $75,118.71, February, 1894;
Voucher No. 6, $44,630.22, March, 1894;
Voucher No. 7, $202,481.40, July, 1894;
Voucher No. 10, $481,933.67, September, 1894;
Voucher No. 7, $88,922.63, October, 1894;
Voucher No. 48, $44,303.92, November, 1894;
Voucher No. 11, $38,903.72, December, 1894;
Voucher No. 41, $39,368.67, January, 1895;
Voucher No. 7, $31,659.28, February, 1895;
Voucher No. 10, $25,612.62, March, 1895;
Voucher No. 30, $63,656.50, April, 1895;
Voucher No. 22, $19,860.08, May, 1895;

which said false and fraudulent claims the said Captain Carter caused to be made by knowingly permitting the said Atlantic Contracting Company, which had previously entered into a contract dated October 2, 1892, to furnish the United States certain mattresses, stone and other material of specified kinds and qualities for constructing works in said river and harbor district, to furnish and put into said works mattresses, stone, and other material different from, inferior to, cheaper, and of less value to the United States than those contracted for; and by receiving and accepting and paying for the same as of the kinds and qualities contracted for, and by falsely certifying to the correctness of the said vouchers, well knowing that the mattresses, stone, and other material charged for in said vouchers as having been furnished had not in fact been furnished; each of the said claims having been made in or about the month named in the above description of the voucher relating to it."

1422 Specification III.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, being at the time the officer in local charge of river and harbor improvements in the Savannah river and harbor district, did cause to be made certain false and fraudulent claims against the United States and in favor of the Atlantic Contracting Company, a corporation, knowing the same to be false and fraudulent, to wit: Claims represented by the following vouchers submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving Jekyl creek, Georgia':

Voucher No. 2, $3,309.40, June, 1893;
Voucher No. 1, $3,595.38, July, 1893;

and by following voucher, submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving waterway between Savannah, Georgia, and Ferdinanda, Florida. Applied to that work at Jekyl creek, Georgia':

Voucher No. 1, $14,591.00, July, 1893;

which said false and fraudulent claims the said Captain Carter caused to be made, by knowingly permitting the said Atlantic Contracting Company, which had previously entered into a contract dated March 1, 1893, to furnish the United States certain mattresses, stone and other material of specified kinds and qualities for constructing works in said river and harbor district, to furnish and put into said works mattresses, stone and other material different from, inferior to, cheaper, and of less value to the United States than those contracted for; and by receiving and accepting and paying for the same as of the kinds and qualities contracted for, and by falsely certifying to the correctness of the said vouchers, well knowing that the mattresses, stone and other material charged for in said vouchers as having been furnished had not in fact been furnished; each of the said claims having been made in or about the month named in the above description of the voucher relating to it."

Specification IV.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, being at the time the officer in local charge of river and harbor improvements in the Savannah
1423 river and harbor district, did cause to be made certain false and fraudulent claims against the United States and in favor of Anson M. Bangs, knowing the same to be false and fraudulent, to wit: The claims represented by the following vouchers submitted by the said Captain Carter with his accounts, and marked 'Appropriation for improving Cumberland sound, Georgia':

Voucher No. 13, $874.73, December, 1894;
Voucher No. 42, $9,845.35, January, 1895;
Voucher No. 8, $17,800.50, February, 1895;

and by the following vouchers submitted by the said Captain Carter with his accounts, and marked 'Appropriation for improving Cumberland sound, Georgia and Florida':

Voucher No. 9, $21,287.65, March, 1895;
Voucher No. 29, $29,659.82, April, 1895;
Voucher No. 23, $32,059.92, May, 1895;

which said false and fraudulent claims the said Captain Carter caused to be made by knowingly permitting the said Anson M. Bangs, who had previously entered into a contract, dated November 15, 1894, to furnish the United States certain mattresses, stone and other material, of specified kinds and qualities, for constructing works in said river and harbor district, to furnish and put into said work mattresses, stone and other material, different from, inferior to, cheaper, and of less value to the United States than those contracted for; and by receiving and accepting and paying for the same as of the kinds and qualities contracted for, and by falsely certifying to the correctness of the said vouchers, well knowing that the mattresses, stone and other material charged for in said vouchers as having been furnished had not in fact been furnished; each of the said claims having been made in or about the month named in the above description of the voucher relating to it."

Specification V.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, being at the time the officer in local

charge of river and harbor improvements in the Savannah river and harbor district, did cause to be made certain false and fraudulent claims against the United States and in favor of William T. Gaynor, knowing the same to be false and fraudulent, to wit: The claims represented by the following voucher submitted by the said
1424 Captain Carter with his accounts, and marked 'Appropriation for improving harbor at Darien, Georgia':

Voucher No. 16, $17,728.81, June, 1895;

and by the following voucher submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving harbor at Darien, Georgia; improving Altamaha river, Georgia; improving waterway between Savannah, Georgia, and Ferdinanda, Florida; improving Jekyl creek, Georgia':

Voucher No. 14, $27,861.32, July, 1895;

which said false and fraudulent claims the said Captain Carter caused to be made, by knowingly permitting William T. Gaynor, who had previously entered into a contract dated April 20, 1895, to furnish the United States certain mattresses, stone, and other materials, of specified kinds and qualities, for constructing works in said river and harbor district, to furnish and put into said work mattresses, stone, and other material, different from, inferior to, cheaper, and of less value to the United States than those contracted for, and by receiving and accepting and paying for the same as of kinds and qualities contracted for, and by falsely certifying to the correctness of said vouchers, well knowing that the mattresses, stone, and other material charged for in said vouchers as having been furnished had not in fact been furnished; each of the said claims having been made in or about the month named in the above description of the voucher relating to it."

Specification VI.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, being at the time the officer in local charge of river and harbor improvements in the Savannah river and harbor district, did cause to be made certain false and fraudulent claims against the United States and in favor of the Atlantic Contracting Company, a corporation, knowing the same to be false and fraudulent, to wit: The claim represented by the following voucher, submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving harbor at Savannah, Georgia':

Voucher No. 8, $230,749.90, July, 1897;

1425 and the claim represented by the following voucher, submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving Cumberland sound, Georgia and Florida':

Voucher No. 9, $345,000.00, July, 1897;

which said false and fraudulent claims the said Captain Carter caused to be made by knowingly permitting the said Atlantic Contracting Company, which had previously entered into contracts, dated October 8, 1896, to furnish the United States certain mattresses, stone, and other material, of specified kinds and qualities, for constructing works in said river and harbor district, to furnish and put into said works, mattresses, stone and other material different from,

inferior to, cheaper, and of less value to the United States than those contracted for; and by receiving and accepting and paying for the same as of the kinds and qualities contracted for, and by falsely certifying to the correctness of the said vouchers, well knowing that the mattresses, stone, and other material charged for in said vouchers as having been furnished, had not in fact been furnished; each of the said claims having been made in or about the month named in the above description of the voucher relating to it."

Specification VII.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, being the engineer officer in local charge of the works of the river and harbor improvement in the Savannah district, did cause to be prepared a pay-roll, the same being voucher No. [illegible] to his account with the United States for the month of December, 1896, appropriation for improving the harbor at Savannah, Georgia, upon which voucher the said Carter did cause to be entered the names of certain persons, hereinafter named, as laborers, and did cause to be presented to him, the said Captain Carter, for payment, and did cause to be paid to the said persons according to said voucher, knowing the same to be false and fraudulent, for services as laborers during the month of December, 1896, the following amounts, to wit: To William Naylor the sum of one dollar ($1.00); to H. Robert[illegible] the sum of four dollars ($4.00); to D. A. Holland the sum of four dollars and fifty cents ($4.50); to S. G. Vinson the sum of twelve dollars and twenty-five cents ($12.25); to P. P. Cotton the sum of six dollars and fifty
1426 cents ($6.50); to J. D. Robinson, Jr., the sum of fifty cents ($0.50); the claims for such services being false and fraudulent in that none of the said persons had rendered services as laborers as set forth in said voucher; and he, the said Carter, well knowing that such claims were false and fraudulent.

"This at Savannah, Georgia, on or about December 21, 1896."

Specification VIII.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, being the engineer officer in local charge of the works of river and harbor improvements of the Savannah district, did cause to be entered on voucher No. 5 of his account with the United States for the month of January, 1897, appropriation for improving harbor at Savannah, Georgia, among other things, an account against the United States for the construction by the Atlantic Contracting Company, during the month of December, 1896, of seventy-six (76) linear feet of piling in repairing the Garden Bank training wall near Savannah, Georgia, at $1.60 per linear foot, amounting to $121.60, and did cause to be presented to him, the said Captain Carter, for payment, and did cause to be paid to the said Atlantic Contracting Company, according to said voucher, a claim against the United States in the sum of one hundred and twenty-one dollars and sixty cents ($121.60), the said claim being false and fraudulent, in that only forty-eight (48) linear feet of the piling charged in said account *was* actually constructed, and the service actually rendered as to the other twenty-eight (28) feet charged for was not the construction of piling in repairing said training wall, but was the driving of seven (7) guide-piles for sink-

ing mattresses, the said guide-piles having been driven by the said Atlantic Contracting Company for itself and its sole use and convenience in sinking said mattresses; and he, the said Captain Carter, well knowing that said claim was false and fraudulent.

"This at Savannah, Georgia, on or about January 12, 1897."

Specification IX.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, being the engineer officer in local charge of the works of river and harbor improvement of the Savannah district, did cause to be entered on voucher No. 27 to
1427 his account with the United States for the month of March, 1897, appropriation for improving harbor at Savannah, Georgia, on account against the United States for the construction by the Atlantic Contracting Company during the month of February, 1897, of two hundred and forty (240) linear feet of pile-work in repairing training walls near Savannah, Georgia, at $1.60 per linear foot, amounting to $384.00, and did cause to be presented to him, the said Captain Carter, for payment, and did cause to be paid to the said Atlantic Contracting Company, according to said voucher, a claim against the United States in the sum of three hundred and eighty-four dollars ($384.00); the said claim being false and fraudulent, in that the service actually rendered was not the construction of two hundred and forty (240) linear feet of pile-work in repairing said training walls, but was the driving of sixty guide-piles for sinking mattresses, the said guide-piles having been driven by said Atlantic Contracting Company for itself and its sole use and convenience in sinking said mattresses, and he, the said Captain Carter, well knowing that said claim was false and fraudulent.

"This at Savannah, Georgia, on or about the tenth day of March, 1897."

Specification X.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, being the engineer officer in local charge of the works of river and harbor improvement of the Savannah district, did cause to be entered on voucher No. 21 to his account with the United States for the month of June, 1897, appropriation for improving harbor at Savannah, Georgia, an account against the United States for the construction by the Atlantic Contracting Company, during the month of May, 1897, of sixty-eight (68) linear feet of pile dams in repairing training walls and spur dams near Savannah, Georgia, at $1.60 per linear foot, amounting to $108.80, and did cause to be presented to him, the said Captain Carter, for payment, and did cause to be paid to the said Atlantic Contracting Company, according to said voucher, a claim against the United States in the sum of one hundred and eight dollars and eighty cents ($108.80); the said claim being false and fraudulent in that the service actually rendered was not the
1428 construction of sixty-eight (68) linear feet of pile dams in repairing said training walls and spur dams, but was the driving of seventeen (17) guide-piles for sinking mattresses; the said guide-piles having been driven by said Atlantic Contracting Company for itself and its sole use and convenience in sinking said mattresses;

and he, the said Captain Carter, well knowing that said claim was false and fraudulent.

"This at Savannah, Georgia, on or about the nineteenth day of June, 1897."

Charge III.—"Conduct unbecoming an officer and a gentleman, in violation of the 61st article of war."

Specification I.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, being the officer in local charge for the United States of river and harbor improvements in the Savannah river and harbor district, did willfully and knowingly cause the following amounts to be paid, out of the moneys of the United States subject to his order and control as such officer in charge of said improvements, the accounts on which the same were paid being false, the amounts paid not being due or owing from the United States to the parties paid or to any one, and he, the said Captain Carter, well knowing this to be the case; the said accounts, the amounts paid, and the payments being those designated by the following vouchers (and the entries therein and endorsements thereon) submitted by the said Captain Carter with his accounts, and marked 'Appropriation for improving Cumberland sound, Georgia and Florida:'

Voucher No. 18, $1,713.23, November, 1892;
Voucher No. 13, $21,102.67, December, 1892;
Voucher No. 20, $24,529.95, December, 1892;
Voucher No. 26, $493.59, January, 1893;
Voucher No. 3, $20,274.07, February, 1893;
Voucher No. 2, $16,433.14, March, 1893;
Voucher No. 1, $14,218.86, April, 1893;
Voucher No. 2, $27,436.06, May, 1893;
Voucher No. 5, $9,337.85, May, 1893;
Voucher No. 6, $26,706.46, May, 1893;

and those indicated and designated by the following vouchers,
1429 and the entries therein and endorsements thereon, submitted by the said Captain Carter with his accounts and marked 'Appropriations for improving harbor at Savannah, Georgia:'

Voucher No. 11, $3,265.61, November, 1892;
Voucher No. 2, $15,000.00, December, 1892;
Voucher No. 24, $8,507.45, December, 1892;
Voucher No. 28, $20,000.00, December, 1892;
Voucher No. 3, $25,416.81, January, 1893;
Voucher No. 1, $42,722.83, February, 1893;
Voucher No. 3, $15.71, February, 1893;
Voucher No. 2, $44,985.47, March, 1893;
Voucher No. 8, $38,076.11, March, 1892;
Voucher No. 2, $20,584.51, April, 1893;
Voucher No. 4, $30,000.00, May, 1893;
Voucher No. 28, $6,105.69, May, 1893;
Voucher No. 3, $5,968.18, July, 1893;
Voucher No. 4, $34,177.94, July, 1893;
Voucher No. 5, $46,592.39, July, 1893;
Voucher No. 2, $57,013.64, August, 1893;
Voucher No. 1, $97,159.99, September, 1893;

Voucher No. 1, $59,554.84, October, 1893;
Voucher No. 1, $52,452.22, November, 1893;
Voucher No. 2, $85,752.28, December, 1893;
Voucher No. 1, $44,175.02, January, 1894;
Voucher No. 2, $27,057.00, January, 1894;
Voucher No. 4, $75,118.71, February, 1894;
Voucher No. 6, $44,630.22, March, 1894;
Voucher No. 7, $202,481.40, July, 1894;
Voucher No. 10, $481,933.67, September, 1894;
Voucher No. 7, $88,922.63, October, 1894;
Voucher No. 48, $44,303.92, November, 1894;
Voucher No. 11, $38,903.72, December, 1894;
Voucher No. 41, $39,3 8.67, January, 1895;
Voucher No. 7, $31,659.28, February, 1895;
Voucher No. 10, $25,612.62, March, 1895;
Voucher No. 30, $63,656.50, April, 1895;
Voucher No. 22, $19,860.08, May, 1895;

and those indicated and designated by the following vouchers (and the entries therein and endorsements thereon), submitted by
1430 the said Captain Carter with his accounts and marked 'Appropriation for improving Jekyl creek, Georgia':

Voucher No. 2, $3,309.40, June, 1893;
Voucher No. 1, $3,595.38, July, 1893;

and the one indicated and designated by the following voucher (and the entries therein and endorsements thereon), submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving waterway between Savannah, Georgia, and Ferdinanda, applied to that work at Jekyl creek, Georgia':

Voucher No. 1, $14,591.00, July, 1893;

and those indicated and designated by the following vouchers (and the entries therein and endorsements thereon), submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving Cumberland sound, Georgia':

Voucher No. 12, $874.73, December, 1894;
Voucher No. 42, $9,845.35, January, 1895;
Voucher No. 8, $17,800.50, February, 1895;

and those indicated and designated by the following vouchers (and the entries therein and endorsements thereon), submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving Cumberland sound, Georgia and Florida':

Voucher No. 9, $21,287.65, March, 1895;
Voucher No. 29, $29,659.82, April, 1895;
Voucher No. 23, $32,059.92, May, 1895;

and the one indicated and designated by the following voucher (and the entries therein and endorsements thereon), submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving harbor at Darien, Georgia':

Voucher No. 16, $17,728.81, June, 1895;

and the one indicated and designated by the following voucher (and the entries therein and endorsements thereon), submitted by the said Captain Carter with his accounts and marked 'Appropriation for

improving harbor at Darien, Georgia. Improving Altahama river, Georgia. Improving waterway between Savannah, Georgia, and Ferdinanda, Florida. Improving Jekyl creek, Georgia':

Voucher No. 14, $27,861.32, July, 1895;

1431 and the said Captain Carter causing each of the said payments to be made in or about the month named in the above description of the voucher relating to it, by drawing and delivering a check as such officer in charge of river and harbor improvements, by which he ordered and directed that the amount indicated be paid out of the moneys of the United States then under his control as such officer."

Specification II.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, being the officer in local charge for the United States of river and harbor improvements in the Savannah river and harbor district, did wilfully and knowingly cause the following amounts to be paid out of the moneys of the United States subject to his order and control as officer in charge of said improvements to the Atlantic Contracting Company, a corporation; the accounts on which the same were paid being false, and the amounts paid not being due or owing from the United States to the said company, or to any one, and he, the said Captain Carter, well knowing this to be the case; the said accounts and amounts paid and the payments being those designated by the following voucher (and the entries therein and endorsements thereon), submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving harbor at Savannah, Georgia':

Voucher No. 8, $230,749.90, July, 1897;

and the one indicated and designated by the following voucher (and the entries therein and endorsements thereon), submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving Cumberland sound, Georgia and Florida':

Voucher No. 9, $345,000, July, 1897;

each of the said payments having been caused to be made on or about July 6, 1897, by the said Captain Carter drawing and delivering a check as such officer in charge of river and harbor improvements, by which the payment was ordered and directed to be made out of moneys of the United States under his control as such officer."

Specification III.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, being the engineer officer in local charge of the works of river and harbor improvement of the

1432 Savannah district, did, at Savannah, Georgia, on or about December 31, 1896, in submitting to the Chief of Engineers, United States Army, a comparative estimate of the cost of improving Savannah harbor, in which estimate there was an item of '360,000 square yards brush mattresses,' make the following statement regarding said item:

"'In the specifications only 200,000 square yards of mattresses are given, but as new soundings show that 300,000 square yards will be required, this estimate has been changed as provided in par. 44 of the specifications.'

"Meaning by the word 'specifications' the specifications to the contract with the Atlantic Contracting Company, for improving Savannah harbor, dated October 8, 1896, which statement was false in fact, as no new soundings had been made between June 6, 1896, the date of said specifications and said date of making said false statement, and which statement was known by him (the said Captain Carter) to be false in fact and was intended to deceive."

Specification IV.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, being the engineer officer in local charge of the works of river and harbor improvement of the United States in the Savannah district, having caused to be prepared a pay-roll, the same being voucher No. 30 to his account with the United States for the month of December, 1896, appropriation for improving harbor at Savannah, Georgia, and having caused to be entered on said voucher the names of certain persons as laborers during the month of December, 1896, and having caused to be paid to said persons divers sums amounting in all to twenty-nine dollars and fifty cents ($29.50), did make and sign the following certificate on said voucher, to wit:

"'I certify that the above pay-roll is correct and just, and the "days" for which payments have been made were days of eight hours each.

O. M. CARTER,
Capt. Corps of Engineers.'

which certificate was false and fraudulent in that none of said persons had rendered services as laborers as set forth in said
1433 voucher No. 30; and which certificates were known by him, the said Captain Carter, to be false and was intended to deceive.

"This at Savannah, Georgia, on or about December 21, 1896."

Specification V.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, being the engineer officer in local charge of the works of river and harbor improvements of the Savannah district, having caused to be entered on voucher No. 5 to his account with the United States for the month of January, 1897, appropriation for improving Savannah harbor, at Savannah, Georgia, among other things, an account against the United States, for the construction by the Atlantic Contracting Company, during the month of December, 1896, of seventy-six (76) linear feet of piling in repairing the Garden Bank training wall, near Savannah, Georgia, at $1.60 per linear foot, amounting to $121.60, did make and sign the following certificate on said voucher, to wit:

"'I certify that the above account is correct and just; the articles have been expended and applied to the purpose for which purchased. The mode of expenditure adopted was most economical and advantageous to the Government.

O. M. CARTER,
Capt. Corps of Engineers.'

which certificate was false in fact in that only forty-eight (48) linear feet of the piling charged in said account *was* actually constructed, and the service actually rendered as to the other twenty-eight (28) feet charged for was not the construction of piling in repairing said training wall, but was the driving of seven (7) guide-piles for sinking mattresses; the said guide-piles having been driven by said Atlantic Contracting Company for itself and its sole use and convenience in sinking said mattresses; and which said certificates was well known by the said Carter to be false in fact, and was intended to deceive.

"This at Savannah, Georgia, on or about January 12, 1897."

Specification VI.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, being the engineer officer in local charge of the works of river and harbor improvement of the
1434 Savannah district, having caused to be entered on voucher No. 27 to his account with the United States for the month of March, 1897, appropriation for improving the harbor of Savannah, Georgia, an account against the United States for the construction, by the Atlantic Contracting Company, during the month of February, 1897, of two hundred and forty (240) linear feet of pile-work in repairing training walls near Savannah, Georgia, at $1.60 per linear foot, amounting to $384.00, did make and sign the following certificate on said voucher, to wit:

"'I certify that the above account is correct and just; the articles have been expended and applied to the purpose for which purchased. The mode of expenditure adopted was most economical and advantageous to the Government.

O. M. CARTER,
Capt. Corps of Engineers.'

which said certificate was false in fact, in that the service actually rendered was not the construction of two hundred and forty (240) linear feet of pile-work in repairing said training walls, but was the driving of sixty (60) guide-piles for sinking mattresses; the said guide-piles having been driven by said Atlantic Contracting Company for itself and its sole use and convenience in sinking said mattresses; and which said certificate was well known by the said Carter to be false in fact, and was intended to deceive.

"This at Savannah, Georgia, on or about the tenth day of March, 1897."

Specification VII.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, being the engineer officer in local charge of the works of river and harbor improvement of the Savannah district, having caused to be entered in voucher No. 21 to his account with the United States for the month of June, 1897, appropriation for improving harbor at Savannah, Georgia, an account against the United States for the construction by the Atlantic Contracting Company during the month of May, 1897, of sixty-eight (68) linear feet of pile dams in repairing training wall and spur dams near Savannah, Georgia, at $1.60 per linear foot, amounting to $108.80, did make and sign the following certificate on said voucher, to wit:

"'I certify that the above account is correct and just.
1435 The mode of expenditure adopted was the most economical and advantageous to the Government.

O. M. CARTER,
Capt. Corps of Engineers.'

which certificate was false in fact, in that the service actually rendered was not the construction of sixty-eight (68) linear feet of pile dams in repairing said training walls and spur dams, but was the driving of seventeen (17) guide-piles for sinking mattresses; the said guide-piles having been driven by said Atlantic Contracting Company for itself and its sole use and convenience in sinking said mattresses; and which said certificate was well known by the said Carter to be false in fact and was intended to deceive.

"This at Savannah, Georgia, on or about the nineteenth day of June, 1897."

Specification VIII.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, devising and intending to defraud the city of Savannah, Georgia, and to aid the Atlantic Contracting Company, a corporation, and John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Anson M. Bangs, and divers other persons, all of whom were likewise with him, the said Captain Carter, devising and intending to defraud the said city, did, on or about February 20, 1896, and thereafter to June 30, 1896, with the said company and the persons named, unlawfully combine and conspire to defraud the said city of divers large sums of money, and to wrongfully compel it, the said city, to dispose of certain valuable rock owned by it, under unfavorable circumstances to it, in order that the said Atlantic Contracting Company might be enabled to purchase the same from the city at a price far below the real cost and value of the same; and in pursuance of the said conspiracy, the said Captain Carter, during the months of February, March, April, May and June, 1896, being the officer of the United States in charge of the river and harbor district, usually called the Savannah district and of the improvements by the United States of rivers and harbors in said district in which the said rock was situated (in a body of navigable water, and outside of the harbor lines of the same, by and under the revocable permission of the Secretary of War), did use
1436 his said position as officer in charge of said district and improvements, and the powers and influence of the same, to have the Secretary of War revoke the said permission and require the said city to remove its said rock from the position occupied by it in the harbor; the means used by him to accomplish this being, among other things, false and misleading statements in letters to his superior officers, and in endorsements on letters referred to him from the War Department, as to the necessity for prompt and speedy removal of the said rock from the position occupied by it in the harbor; and also like statements and other representations made by him to various officials of the said city, and others, orally and in writing."

Specification IX.—"In that Oberlin M. Carter, Corps of Engineers, United States Army, being the officer in charge of the Savannah

river and harbor district, and having been required by the Chief of Engineers, United States Army, by the endorsement on the letter of one Paulding, to furnish information in regard to the proposed acquisition by the United States of certain lands on Hutchinson's island, near Savannah, Georgia, for river and harbor improvement purposes, did, in an endorsement of said letter, dated October 21, 1896, state as follows, to wit:

"'When operations were to begin, excessive rentals were demanded by property-owners, some of whom had taken possession of wharves as a speculation with a view to obtaining excessive damages. The work would have been delayed and its cost increased by about $50,000, and it was therefore abandoned;' which said statement was false, and was known to him, the said Captain Carter, to be false, and was intended by him to deceive Brigadier General William P. Craighill, Chief of Engineers, United States Army.

"This at Savannah, Georgia, on or about October 21, 1896."

Specification X.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, being duly sworn as a witness for the defendant in the case of James B. Brown *vs.* The Atlantic Contracting Company then pending in the city court of Savannah,
1437 Georgia, in which the subject-matter of the litigation was certain rock said to have been delivered by the said Brown to the said company, and then by the company to the United States, to go into certain river and harbor improvements carried on under the said Captain Carter as officer in charge for the United States, did testify on oath in regard to said rock to the effect that the United States did not receive and pay for it, but that they merely allowed the company to dump the same into the works along with the rock received and paid for, the said company not being paid for it; which said testimony was false, in that the United States had received and paid said company for it, and was well known by the said Captain Carter to be false, and was intended by him to deceive the said court and its jury impaneled to try the said case.

"This at Savannah, Georgia, on or about March 15, 1897."

Specification XI.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, being the engineer officer in local charge of the works of river and harbor improvements of the United States in the Savannah district, and having received from one Alfred Hirt, for the United States, on or about December, 1896, the sum of one hundred and thirty-two dollars and ten cents ($132.10) on account of delay of said Hirt in returning, and expense of returning, a diving outfit belonging to the United States and pertaining to the United States snag-boat Satilla, did fail to account, and has failed to account, to the United States for the said sum, or any part thereof, from the time of receiving said sum to the present time, viz., December 10, 1897."

Specification XII.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, being in the city of New York, on or about the 25th day of May, 1897, did, while there, cause a telegram to be sent to the Secretary of War, purporting to come from him in Savannah, Georgia, whereby he intended to deceive the Sec-

retary of War as to where he, the said Captain Carter, was on that date.

"This was at New York, on or about May 25, 1897."

Specification XIII.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, having left Savannah, Georgia, on or about the 2nd day of August, 1894, and having gone to the
1438 State of Montana, did on the 16th day of August, 1894, cause a letter to be forwarded to the Chief of Engineers, United States Army, dated Savannah, Georgia, reporting his, the said Captain Carter's, departure from Savannah on that day, whereby he intended to deceive Brigadier General Thomas L. Casey, Chief of Engineers, United States Army.

"This in Montana, on or about August 16th, 1894."

Specification XIV.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, in a personal report of himself as such officer, made to the Chief of Engineers, United States Army, for the month of April, 1894, did report himself present at his station from the 3rd to the 7th day of April, 1894, both inclusive, which said report was false, in that he was absent from his station during said time (part of it in New York); and which report was well known to him to be false, and was intended to deceive.

"This on or about April 30th, 1894."

Specification XV.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, in a personal report of himself as such officer, made to the Chief of Engineers, United States Army, for the month of August, 1894, did report himself present at his station from the 3rd to the 15th day of August, 1894, both inclusive, which said report was false, in that he was absent from his station during said time (part of it in New York, St. Paul, and Yellowstone national park); and which report was well known to him to be false, and was intended to deceive.

"This on or about August 31st, 1894."

Specification XVI.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, in a personal report of himself as such officer, made to the Chief of Engineers, United States Army, for the month of September, 1894, did report himself present at his station from the 23rd to the 27th day of September, 1894, both inclusive, which said report was false, in that he was absent from his station during said time (part of it in Cincinnati, Ohio); and which report was well known to him to be false and was intended to deceive.

1439 "This on or about September 30, 1894."

Specification XVII.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, in a personal report of himself as such officer made to the Chief of Engineers, United States Army, for the month of October, 1894, did report himself as present at his station on the 4th and 5th days of October, 1894, which said report was false, in that he was absent from his station during said days, and which report was well known to him to be false, and was intended to deceive.

"This on or about October 31, 1894."

Specification XVIII.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, in a personal report of himself as such officer, made to the Chief of Engineers, United States Army, for the month of November, 1894, did report himself present at his station on the 11th and 12th days of November, 1894, which said report was false, in that he was absent from his station during said time (part of it in New York); and which report was well known to him to be false, and was intended to deceive.

"This on or about November 30, 1894."

Specification XIX.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, in a personal report of himself as such officer, made to the Chief of Engineers, United States Army, for the month of December, 1894, did report himself present at his station from the 8th to the 12th day of December, 1894, both inclusive, and from the 24th to the 31st day of December, 1894, both inclusive, which said report was false, in that he was absent from his station during said times (parts of them in New York); and which report was well known to him to be false and was intended to deceive.

"This on or about December 31, 1894."

Specification XX.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, in a personal report of himself as such officer, made to the Chief of Engineers, United States Army, for the month of January, 1895, did report himself present at his station from the 1st to the 9th day of January, 1895, both inclusive,
which said report was false, in that he was absent from his
1440 station during said time (part of it in New York), and which
report was well known to him to be false and was intended to deceive.

"This on or about January 31, 1895."

Specification XXI.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, in a personal report of himself as such officer made to the Chief of Engineers, United States Army, for the month of July, 1895, did report himself present at his station from the 3rd to the 9th day of July, 1895, both inclusive, which said report was false, in that he was absent from his station during the said time (part of it in New York), and which report was well known to him to be false and was intended to deceive.

"This on or about July 31, 1895."

Specification XXII.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, in a personal report of himself as such officer made to the Chief of Engineers, United States Army, for the month of March, 1897, did report himself present at his station from the second to the ninth day of March, 1897, both inclusive, which said report was false in that he was absent from his station during said time (part of it in New York); and which report was well known to him to be false, and was intended to deceive.

"This at Savannah, Georgia, on or about the 31st day of March, 1897."

Specification XXIII.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, in a personal report of himself

as such officer made to the Chief of Engineers, United States Army, for the month of May, 1897, did report himself present at his station on the 24th day of May, 1897, which said report was false, in that he was absent from his station on said day (and was in New York) and which report was well known to him to be false, and was intended to deceive.

"This at Savannah, Georgia, on or about May 31, 1897."

Charge IV.—"*Embezzlement, as defined in section 5488, Revised* Statutes of the United States, in violation of the 62nd article of war."

Specification I.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, being the officer in charge for the United States of river and harbor improvements in the Savan-
1441 nah river and harbor district, and, as such officer in charge of said improvements, being a disbursing officer of the United States, and having entrusted to him large amounts of public money of the United States, did wilfully and knowingly apply for a purpose not authorized by law large sums of the said moneys so entrusted to him, by wilfully and knowingly causing the amounts hereinafter named to be paid out of the said moneys which were subject to his order and control as such officer in charge of said improvements; the accounts on which the same were paid being false, the amounts paid not being due or owing from the United States to the parties paid, or to any one, and he, the said Captain Carter, well knowing this to be the case; the said accounts, the amounts paid, and the payments being those designated by the following voucher (and the entries therein and the endorsements thereon), submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving harbor at Savannah, Georgia':

Voucher No. 8 ($230,749.90), July, 1897;

and the one indicated and designated by the following voucher (and the entries therein and endorsements thereon), submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving Cumberland sound, Georgia and Florida':

Voucher No. 9 ($345,000.00), July, 1897;

each of the said payments having been caused to be made on or about July 6, 1897, by the said Captain Carter drawing and delivering a check as such officer in charge of river and harbor improvements, by which the payment was ordered and directed to be made out of moneys of the United States under his control as such officer."

Specification II.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, being the officer in charge for the United States of river and harbor improvements in the Savannah river and harbor district, and as such officer in charge of said improvements, being a disbursing officer of the United States, and having entrusted to him large amounts of public money of the United States, did wilfully and knowingly apply, for a purpose not authorized by law, large sums of the said moneys so entrusted
1442 to him, by wilfully and knowingly causing the following amounts to be paid out of the said moneys which were sub-

ject to his order and control as such officer in charge of said improvements; the accounts on which the same were paid being false, the amounts paid not being due or owing from the United States to the parties paid, or to any one, and he, the said Captain Carter, well knowing this to be the case; the said accounts, the amounts paid, and the payments being those designated by the following vouchers (and the entries therein and endorsements thereon), submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving Cumberland sound, Georgia and Florida':

Voucher No. 18, for $1,713.23, November, 1892;
Voucher No. 13, for $21,102.67, December, 1892;
Voucher No. 20, for $24,529.95, December, 1892;
Voucher No. 26, for $493.59, January, 1893;
Voucher No. 3, for $20,274.07, February, 1893;
Voucher No. 2, for $16,433.14, March, 1893;
Voucher No. 1, for $14,218.86, April, 1893;
Voucher No. 2, for $27,436.06, May, 1893;
Voucher No. 5, for $9,337.85, May, 1893;
Voucher No. 6, for $26,706.46, May, 1893;

and those indicated and designated by the following vouchers (and the entries therein and endorsements thereon) submitted by the said Captain Carter with his accounts, and marked 'Appropriation for improving harbor at Savannah, Georgia':

Voucher No. 11, $3,265.61, November, 1892;
Voucher No. 2, $15,000.00, December, 1892;
Voucher No. 24, $8,507.45, December, 1892;
Voucher No. 28, $20,000.00, December, 1892;
Voucher No. 3, $25,416.81, January, 1893;
Voucher No. 1, $42,722.83, February, 1893;
Voucher No. 3, $15.71, February, 1893;
Voucher No. 2, $44,985.47, March, 1893;
Voucher No. 8, $38,076.11, March, 1893;
Voucher No. 2, $20,584.51, April, 1893;
Voucher No. 4, $30,000.00, May, 1893;
Voucher No. 28, $6,105.69, May, 1893;
Voucher No. 3, $5,968.18, July, 1893;
1443 Voucher No. 4, $34,177.94, July, 1893;
Voucher No. 5, $46,592.39, July, 1893;
Voucher No. 2, $57,013.64, August, 1893;
Voucher No. 1, $97,159.99, September, 1893;
Voucher No. 1, $59,554.84, October, 1893;
Voucher No. 1, $52,452.22, November, 1893;
Voucher No. 2, $85,752.28, December, 1893;
Voucher No. 1, $44,175.02, January, 1894;
Voucher No. 2, $27,057.00, January, 1894;
Voucher No. 4, $75,118.71, February, 1894;
Voucher No. 6, $44,630.22, March, 1894;
Voucher No. 7, $202,481.40, July, 1895;
Voucher No. 10, $481,933.67, September, 1894;
Voucher No. 7, $88,922.63, October, 1894;
Voucher No. 48, $44,303.92, November, 1894;

Voucher No. 11, $38,903.72, December, 1894;
Voucher No. 41, $39,368.67, January, 1895;
Voucher No. 7, $31,659.28, February, 1895;
Voucher No. 10, $25,612.62, March, 1895;
Voucher No. 30, $63,656.50, April, 1895;
Voucher No. 22, $19,860.08, May, 1895;
and those indicated and designated by the following vouchers (and the entries therein and endorsements thereon) submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving Jekyl creek, Georgia':
Voucher No. 2, $3,309.40, June, 1893;
Voucher No. 1, $3,595.38, July, 1893;
and the one indicated and designated by the following voucher (and the entries therein and endorsements thereon) submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving waterway between Savannah, Georgia, and Ferdinanda, Florida, applied to that work at Jekyl creek, Georgia':
Voucher No. 1, $14,591.00, July, 1893;
and those indicated and designated by the following vouchers (and the entries therein and endorsements thereon) submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving Cumberland sound, Georgia':
Voucher No. 13, $874.73, December, 1894;
1444 Voucher No. 42, $9,845.35, January, 1895;
Voucher No. 8, $17,800.50, February, 1895;
and those indicated and designated by the following vouchers (and the entries therein and endorsements thereon) submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving Cumberland sound, Georgia and Florida':
Voucher No. 9, $21,287.65, March, 1895;
Voucher No. 29, $29,659.82, April, 1895;
Voucher No. 23, $32,059.92, May, 1895;
and the one indicated and designated by the following voucher (and the entries therein and endorsements thereon) submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving harbor at Darien, Georgia':
Voucher No. 16, $17,728.81, June, 1895;
and the one indicated and designated by the following voucher (and the entries therein and endorsements thereon) submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving harbor at Darien, Georgia. Improving Altahama river, Georgia. Improving waterway between Savannah, Georgia, and Ferdinanda, Florida. Improving Jekyl creek, Georgia':
Voucher No. 14, $27,861.32, July, 1895;
the said Captain Carter causing each of the said payments to be made in or about the month named in the above description of the voucher relating to it, by drawing and delivering a check as such officer in charge of river and harbor improvements by which he ordered and directed that the amount indicated be paid out of the moneys of the United States then under his control as such officer."

To which charges and specifications the accused, Captain Oberlin M. Carter, Corps of Engineers, pleaded as follows:

Charge I.

To the 1st specification, in bar of trial, the statute of limitation (103d article of war), which plea was sustained by the court.
To the 2d specification, "Not guilty."
To the charge, "Not guilty."

1445 Charge II.

To the 1st, 2d, 3d, 4th, and 5th specifications, in bar of trial, the statute of limitation (103d article of war); which plea was sustained by the court.
To the 6th specification, "Not guilty."
To the 7th specification, "Not guilty."
To the 8th specification, "Not guilty."
To the 9th specification, "Not guilty."
To the 10th specification, "Not guilty."
To the charge, "Not guilty."

Charge III.

To the 1st specification, in bar of trial, the statute of limitation (103d article of war); which plea was sustained by the court.
To the 2d specification, "Not guilty."
To the 3d specification, "Not guilty."
To the 4th specification, "Not guilty."
To the 5th specification, "Not guilty."
To the 6th specification, "Not guilty."
To the 7th specification, "Not guilty."
To the 8th specification, "Not guilty."
To the 9th specification, "Not guilty."
To the 10th specification, "Not guilty."
To the 11th specification, "Not guilty."
To the 12th specification, "Not guilty."
To the 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, and 21st specifications, in bar of trial the statute of limitation (103d article of war); which plea was sustained by the court.
To the 22d specification, "Not guilty."
To the 23d specification, "Not guilty."
To the charge, "Not guilty."

Charge IV.

To the 1st specification, "Not guilty."
To the 2d specification, in bar of trial, the statute of limitation (103d article of war); which plea was sustained by the court.
To the charge, "Not guilty."

Finding.

And the court, after due deliberation, finds the accused, Captain Oberlin M. Carter, Corps of Engineers, as follows:

1446 Charge I.

Of the 2d specification, "Guilty, except the words 'and other material' and interpolating the word 'and' between the words 'mattresses' and 'stone' wherever those words occur in the specification; of the excepted words not guilty and of the interpolated words guilty."

Of the charge, "Guilty."

Charge II.

Of the 6th specification, "Guilty, except of the words 'and other material' where they occur the second and third time and interpolating the word 'and' between the words 'mattresses' and 'stone' where they occur the second and third time; of the excepted words not guilty; of the interpolated word guilty."

Of the 7th specification, "Guilty."

Of the 8th specification, "Guilty."

Of the 9th specification, "Guilty."

Of the 10th specification, "Guilty."

Of the charge, "Guilty."

Charge III.

Of the 2d specification, "Guilty."

Of the 3d specification, "Guilty."

Of the 4th specification, "Guilty."

Of the 5th specification, "Guilty, except of the words 'the articles have been' and of the excepted words not guilty."

Of the 6th specification, "Guilty."

Of the 7th specification, "Guilty."

Of the 8th specification, "Not guilty."

Of the 9th specification, "Guilty."

Of the 10th specification, "Not guilty."

Of the 11th specification, "Guilty."

Of the 12th specification, "Not guilty."

Of the 22d specification, "Guilty."

Of the 23d specification, "Not guilty."

Of the charge, "Guilty."

Charge IV.

Of the 1st specification, "Guilty."

Of the charge, "Guilty."

1447 *Sentence.*

And the court does therefore sentence the accused, Captain Oberlin M. Carter, Corps of Engineers, United States Army, "to be dismissed from the service of the United States, to suffer a fine of five thousand dollars, to be confined at hard labor at such place as the proper authority may direct for five years, and the crime, punishment, name and place of abode of the accused to be published in the newspapers in and about the station and in the State from which the accused came, or where he usually resides."

The record of the proceedings of the general court-martial in the foregoing case of Captain Oberlin M. Carter, Corps of Engineers, having been submitted to the President, the following are his orders thereon:

The findings of the court-martial in the matter of the foregoing proceedings against Captain Oberlin M. Carter, Corps of Engineers, U. S. Army, are hereby approved as to all except the following:

Charge 2. Specifications seven, eight, nine, and ten.

Charge 3. Specifications three, four, five, six, seven, nine, eleven, and twenty-two, which are disapproved. And the sentence imposed by the court-martial upon the defendant, Oberlin M. Carter, is hereby approved.

ELIHU ROOT,
Secretary of War.

EXECUTIVE MANSION,
WASHINGTON, D. C., *September* 29, 1899.

Approved and confirmed.

WILLIAM McKINLEY.

By direction of the Secretary of War, Captain Oberlin M. Carter, Corps of Engineers, ceases to be an officer of the army from this date, and the United States penitentiary, Fort Leavenworth, Kansas, is designated as the place for his confinement, where he will be sent by the commanding general, Department of the East, under proper guard.

By command of Major General Miles:

H. C. CORBIN,
Adjutant General.

1448 UNITED STATES OF AMERICA,
WAR DEPARTMENT, WASHINGTON, *October* 30, 1900.

I hereby certify that the document hereto annexed is a correct copy of the original order publishing the result of the trial by general court-martial of Captain Oberlin M. Carter, Corps of Engineers, on file in the Adjutant General's Office.

H. C. CORBIN,
Adjutant General.

Be it known that H. C. Corbin, who signed the foregoing certificate, is the Adjutant General of the Army, and that to his attestation as such full faith and credit are and ought to be given.

In witness whereof I have hereunto set my hand and [SEAL.] caused the seal of the War Department to be affixed on this thirtieth day of October, one thousand nine hundred.

ELIHU ROOT,
Secretary of War.

Endorsed: No. 7849. Exhibit "A." Filed Nov. 23, 1900. Geo. F. Sharitt, clerk.

1449–1739 EXHIBIT ½ A.

In the Circuit Court of the United States for the District of Kansas, First Division.

OBERLIN M. CARTER, on the Petition of I. STANTON CARTER, Petitioner,
vs.
ROBERT W. MCLAUGHRY.

The United States of America to Robert W. McLaughry, warden of the United States penitentiary at Fort Leavenworth, Kansas:

We command you that the body of Oberlin M. Carter, in your custody detained, as it is said, together with the day and cause of his caption and detention, you safely have before the circuit court of the United States for the district of Kansas, first division, at the United States court-room, in the city of Leavenworth, State of Kansas, on the 26th day of October, A. D. 1900, at 10 o'clock a. m. of said day, then and there to do all and singular those things which the said court shall then and there consider of him in this behalf; and have you then and there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States.

[SEAL.] Attested by the seal of said court, at Leavenworth, Kansas, this 17th day of October, in the year of our Lord one thousand nine hundred.

GEO. F. SHARITT, *Clerk.*

Endorsed: No. 7849. Exhibit ½ A. Filed Nov. 23, 1900. Geo. F. Sharitt, clerk.

1740 & 1741 No. 7849.

EXHIBIT "J."

Transcript of Record.

Supreme Court of the United States, October Term, 1899.

OBERLIN M. CARTER, on the Petition of ABRAM J. ROSE, Petitioner,
against
BENJAMIN K. ROBERTS. } No. 513.

On petition for a writ of certiorari to the United States circuit court of appeals for the second circuit.

Filed Nov. 23, 1900.

GEO. F. SHARITT, *Clerk.*

1742 & 1743 *Index.*

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1744 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between Oberlin M. Carter on the petition of Abram J. Rose for a writ of *habeas corpus* and Capt. Benjamin K. Roberts, respondent, a manifest error hath happened, to the great damage of the said petitioner, as is said and appears by his complaint; we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the judges of the United States circuit court of appeals for the second circuit, at the city of New York, together with this writ, so that you have the same at the said place, before the judges aforesaid, on the 20th day of November, 1899, that the record and proceedings aforesaid being inspected, the said judges of the
1745 United States circuit court of appeals for the second circuit may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 23d day of October, in the year of our Lord one thousand eight hundred and ninety-nine, and

of the Independence of the United States the one hundred and twenty-fourth.

[L. S.] JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.
E. HENRY LACOMBE,
U. S. Circuit Judge.

UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from three (3) to seventy-seven (77) inclusive, contain a true and complete transcript of the record and proceedings had in said court in the matter of the petition of Abram J. Rose for a writ of *habeas corpus* for Oberlin M. Carter, relator, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this fourteenth day of November, in the year of our Lord one thousand eight hun-
1746 dred and ninety-nine, and of the Independence of the United States the one hundred and twenty-fourth.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

(Stamp.)

(Endorsed:) The U. S. circuit court of appeals for the second circuit. Oberlin M. Carter, on the petition of Abram J. Rose, plaintiff in error, *vs.* Benjamin K. Roberts, defendant in error. Original writ of error. Kellogg, Rose & Smith, attorneys for plaintiff in error. Due service of a copy of the within writ of error is hereby admitted this 23d day of Oct., 1899. U. S. circuit court. Filed Oct. 23, 1899. John A. Shields, clerk.

To the circuit court of the United States for the southern district of New York:

The petition of Abram J. Rose shows:

First. That your petitioner is the attorney for Oberlin M. Carter, who prior to the 29th day of September, 1899, was an officer duly appointed in the Army of the United States, holding the rank of captain of the Corps of Engineers.

Second. That said Carter is imprisoned and restrained in his liberty in Castle William, Governor's island, in the southern district of New York, in the custody of General Wesley Merritt, commanding the Department of the East, United States Army, and by Capt. Ben-

jamin K. Roberts, capt. 5th artillery, commanding Fort Columbus, N. Y.

Third. That he has been committed and is detained by virtue of a sentence imposed upon him by a general court-martial, con-
1747 vened by the President of the United States, which said sentence is as follows: "And the court does therefore sentence the accused Captain Oberlin M. Carter, Corps of Engineers, United States Army, to be dismissed from the service of the United States, to suffer a fine of five thousand dollars, to be confined at hard labor at such place as the proper authority may direct for five years and the crime, punishment, name and place of abode of the accused to be published in the newspapers in and about the station and the State from which the accused came or where he usually resides."

That said sentence was approved by the Secretary of War and approved and confirmed by the President of the United States on the 29th day of September, 1899.

Fourth. That the cause or pretense of the imprisonment and restraint, according to the best knowledge and belief of the petitioner, is that charges and specification- were preferred against said Oberlin M. Carter, under the articles of war, as contained in the Revised Statutes of the United States, charging the said Oberlin M. Carter with conspiracy in violation of the sixtieth article of war, and in presenting false claims in violation of said sixtieth article of war, and with embezzlement, as defined in section 5488 of the Revised Statutes of the United States in violation of the sixtieth article of war, and with conduct unbecoming an officer and a gentleman, in pursuance of which charges and specifications, proceedings were had before the said general court-martial, convened as aforesaid, which terminated in the sentence above mentioned.

Fifth. That it is provided by article 60 of the articles of war, section 1342 of the Revised Statutes of the United States, that every person who shall have been convicted of the offenses of which
1748 said Carter was found guilty, "shall on conviction thereof, be punished by fine or imprisonment or by such other punishment as a court-martial may adjudge."

Sixth. That in pursuance of said sentence, said Oberlin M. Carter has been dismissed from the service of the United States Army, and the order of dismissal has been duly personally served upon him, as petitioner is informed and believes, and the crime, punishment, name and place of abode of the accused, has been published in the newspapers in and about the station and the State from which the accused came, and where he usually resides, as your petitioner is informed and believes.

Seventh. That having suffered the punishment of dismissal, and the degradation of the publication of the crime and punishment, as imposed by said sentence, the imprisonment and detention of said Oberlin M. Carter is without authority of law, and the further punishment and detention of said Oberlin M. Carter, and the carrying out of said sentence, is contrary to law and the provisions of the Constitution of the United States and is illegal.

Eighth. That notwithstanding the above facts, the said General

Wesley Merritt, Captain Benjamin K. Roberts and persons acting under their orders and authority, are detaining said Oberlin M. Carter in custody and are about to remove him to the military prison at Fort Leavenworth in the State of Kansas to be there confined at hard labor for a period of five years, as imposed by said sentence.

Ninth. That the detention of said Oberlin M. Carter and his proposed removal to Fort Leavenworth, in pursuance of said sentence, is without authority of law, and that any further carrying out of said sentence and the further detention or imprisonment of said Oberlin M. Carter, would be unlawful.

1749 Wherefore, your petitioner prays that a writ of *habeas corpus* may issue out of this court, directed to the said General Wesley Merritt, commanding the Department of the East, and said Captain Benjamin K. Roberts, commanding them to have the body of said Oberlin M. Carter before this honorable court, as shall be directed in the said writ, so that this court may be able to proceed thereon, and do what shall appear to them of right ought to be done.

Dated New York, October 2, 1899.

ABRAM J. ROSE, *Petitioner.*

KELLOGG, ROSE & SMITH,
Att'ys for Petitioner.

UNITED STATES OF AMERICA, }
Southern District of New York, } *ss:*

Abram J. Rose, being duly sworn, says: That he is the petitioner in this proceeding. That he has read the foregoing petition, and that the same is true to his own knowledge, except as to the matters which are therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

ABRAM J. ROSE.

Sworn to before me this — day of October, 1899.

ROB'T LAWRENCE,
[SEAL.] *Notary Public, New York County.*

(Endorsed:) U. S. circuit court, southern dist. of New York. In the matter of the petition of Abram J. Rose for a writ of *habeas corpus* for Oberlin M. Carter. Petition. Kellogg, Rose & Smith, att'ys for petitioner, 120 Broadway, New York. U. S. circuit court. Filed Oct. 2, 1899. John A. Shields, clerk.

1750 The President of the United States of America to General Wesley Merritt, general commanding the Department of
[L. S.] the East of the United States Army, Governor's island, New York harbor, and Captain Benjamin K. Roberts, captain Fifth artillery, commanding Fort Columbus, New York:

We command you that you have the body of Oberlin M. Carter by you imprisoned and detained, as it is said, together with the

time and cause of such imprisonment and detention by whatsoever name the said Oberlin M. Carter shall be called or charged before the circuit court of the United States for the southern district of New York, at the court-house of the said court, in the post-office building in the said city of New York, on the 4th day of October, 1899, at 11 o'clock in the forenoon of that day, to do and receive what shall then and there be considered concerning the said Oberlin M. Carter, and have you then and there this writ.

Witness Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at the city of New York, the 2d day of October, in the year of our Lord one thousand eight hundred and ninety-nine.

JOHN A. SHIELDS,
Clerk Circuit Court of the United States,
Southern District of New York.

(Endorsed:) U. S. circuit court, southern district of New York. In the matter of the petition of Oberlin M. Carter for a writ of *habeas corpus*. Writ. Kellogg, Rose & Smith, att'ys for petitioner, 120 Broadway, New York. Within writ allowed. N. Y., October 2d, 1899. E. Henry Lacombe, U. S. circuit judge. Prisoner 1751 remanded to the custody from which he is produced, to be there detained until the questions raised shall be finally decided by this court and decision endorsed thereon. Oct. 4, 1899. E. Henry Lacombe, U. S. circuit judge. The writ being discharged and appeal taken, prisoner is remanded to the custody from which he is produced in conformity to rule 34. Oct. 23, 1899. E. Henry Lacombe, U. S. circuit judge. U. S. circuit court. Filed Oct. 23, 1899. John A. Shields, clerk.

To the honorable the circuit court of the United States, southern district of New York:

The undersigned, captain of the 5th United States artillery, commanding Fort Columbus, New York, respectfully makes return to the writ, a copy of which is hereto annexed marked "A," and says that he has the custody of the body of Oberlin M. Carter, as the commanding officer of said fort, and that he detains the said Carter, by virtue of instructions from his commanding officer, Major General W. Merritt, commanding the Department of the East; that the said Carter is under sentence of a general court-martial, sentenced to be imprisoned at Fort Leavenworth, Kansas, for five years, and that the said Carter is now in custody, as aforesaid, while awaiting transportation to the aforesaid fort; and your respondent says he is acting in his capacity as such officer by virtue of general orders No. 172, Headquarters of the Army, Adjutant General's Office, Washington, D. C., September 29, 1899, the same containing the charges and specifications under and by virtue of which the said Carter was tried; the findings of the general court-martial; the sentence of the said Carter by the same; the approval of the findings of said court-martial with the exceptions stated in such orders by the Secretary of

War; the approval of the sentence by the latter, and the
1752 approval and confirmation by the President; and your respondent respectfully calls attention to said general orders, a duly authenticated copy of which, marked B, is filed herewith; and the attention of the court is respectfully invited thereto, the contention of respondent being that the said Carter has been lawfully convicted and sentenced by the said general court-martial, which had jurisdiction of the person of said Carter, and of the various offenses for which he was tried.

In obedience to the said writ of *habeas corpus* the respondent herewith produces before the court the body of the said Oberlin M. Carter, but for the reasons set forth prays this honorable court to dismiss the said writ.

BENJAMIN K. ROBERTS,
Captain Fifth U. S. Artillery, Commanding
Fort Columbus, New York Harbor.

New York city, N. Y., October 4, 1899.

(Copy.)

"A."

The President of the United States of America to General Wesley Merritt, general commanding the Department of the East of the United States Army, Governor's island, New York harbor,
[L. S.] and Captain Benjamin K. Roberts, captain Fifth artillery, commanding Fort Columbus, New York:

We command you that you have the body of Oberlin M. Carter by you imprisoned and detained, as it is said, together
1753–1795 with the time and cause of such imprisonment and detention by whatsoever name the said Oberlin M. Carter shall be called or charged before the circuit court of the United States for the southern district of New York, at the court-house of the said court, in the post-office building, in the said city of New York, on the 4th day of October, 1899, at 11 o'clock in the forenoon of that day, to do and receive what shall then and there be considered concerning the said Oberlin M. Carter, and have you then and there this writ.

Witness Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at the city of New York, the 2d day of October, in the year of our Lord one thousand eight hundred and ninety-nine.

JOHN A. SHIELDS,
Clerk Circuit Court of the United States,
Southern District of New York.

(Endorsed:) U. S. circuit court, southern district of New York. In the matter of the petition of Oberlin M. Carter for a writ of *habeas corpus*. Writ. Kellogg, Rose & Smith, att'ys for petitioner, 120 B'way, New York. Within writ allowed. N. Y., Oct. 2, 1899. E. Henry Lacombe, U. S. circuit court judge. U. S. circuit court. Filed Oct. 20, 1899. John A. Shields, clerk.

1796 United States Circuit Court, Southern District of New York.

In the Matter of the Application of ABRAM J. ROSE for a writ of *Habeas Corpus* for the Discharge of Oberlin M. Carter.

Now comes the petitioner for traverse to the return to the writ of *habeas corpus* made herein and says that said Carter has already suffered the punishment of dismissal from the army and the further punishment of publication of the crime and punishment as imposed by the sentence of the court-martial referred to in said return and denies that he is lawfully in custody of the respondent under a lawful conviction and sentence of said court-martial as alleged in said return.

1797 That the sentence of said court-martial as stated in said return was in excess of its powers and jurisdiction and said Carter is held by said respondent without authority of law.

Wherefore petitioner asks that he be discharged.

ABRAM J. ROSE, *Petitioner.*

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Abram J. Rose, being duly sworn, says: That he has read the foregoing return and that the same is true.

ABRAM J. ROSE.

Sworn to before me this 4th October, 1899.

E. HENRY LACOMBE,
U. S. Circuit Judge.

(Endorsed:) U. S. circuit court. Filed Oct. 20, 1899. John A. Shields, clerk.

United States Circuit Court, Southern District of New York.

In the Matter of the Application of ABRAM J. ROSE for the Discharge of Oberlin M. Carter under a Writ of *Habeas Corpus.*

1798 It is hereby stipulated and agreed, that on the 5th day of October, 1899, the said Oberlin M. Carter, by Abram J. Rose, his attorney, tendered to the assistant treasurer of the United States, at the subtreasury in the city of New York, the sum of five thousand dollars, in gold certificates, in payment of the fine for that amount imposed upon the said Carter by the sentence of the court-martial. That such assistant treasurer received the said five thousand dollars and gave a receipt therefor, a copy of which is hereto annexed. That at the time of giving such receipt, it was stated to said Rose that the money would be placed in account 5, to the credit of the Secretary of the Treasury, and if such disposition was not satisfactory, said Rose would be notified. That no notice in that respect has been given said Rose.

It is further stipulated that on the 10th day of October, 1899, said Rose forwarded a duplicate of said receipt to the Secretary of War

by registered letter, and that the same was received by him on or about the 11th day of October, 1899.

It is further stipulated that the facts set forth in the preceding stipulation may be taken, held and considered as part of the petition and return herein, so as to be a part of the record before the court for its consideration in the determination of the questions submitted to it.

New York, 16th October, 1899.

KELLOGG, ROSE & SMITH,
Att'ys for Petitioner.
HENRY L. BURNETT, *U. S. Att'y.*

"No. 243.

OFFICE OF ASSISTANT TREASURER U. S.,
NEW YORK, *Oct.* 5, 1899.

I certify that Abram J. Rose, attorney for Oberlin M. Carter, this day deposited to the credit of the Secretary of the Treasury,
1799 special-deposit account No. 5, five thousand dollars, on account of description, see back, for which I have signed triplicate receipts.

$5,000.

C. N. JORDAN,
Assistant Treasurer U. S."

(Indorsement on back:) "On account of payment of fine imposed on said Carter by sentence of general court-martial as approved by Secretary of War and the President. This deposit subject to approval of the Secretary of the Treasury."

(Endorsed:) U. S. circuit court, southern district of New York. In the matter of the application of Abram J. Rose for the discharge of Oberlin M. Carter under a writ of *habeas corpus*. Stipulation as to payment of fine. Kellogg, Rose & Smith, att'ys for petitioner, 120 Broadway, New York. U. S. circuit court. Filed Oct. 20, 1899. John A. Shields, clerk.

United States Circuit Court, Southern District of New York.

In the Matter of a *Habeas Corpus* on the Relation of OBERLIN M. CARTER.

LACOMBE, *Circuit Judge:*

The sentence of the court-martial duly approved and confirmed, reads "to be dismissed from the service of the United States, to suffer a fine of five thousand dollars, to be confined at hard labor
1800 at such place as the proper authority may direct for five years, and the crime, punishment, name, and place of abode of the accused to be published in and about the station, and in the State from which the accused came, or where he usually resides." The contention of the relator is that, conceding that the court-martial had jurisdiction of the person of the accused, and of the offenses charged, and conceding further the regularity of its proceedings

and the propriety of its findings, it was without power to impose the four separate punishments of dismissal, fine, imprisonment and degradation (special publication of sentence) although it might have imposed either one of them. When application was made for the writ it appeared that the first punishment, dismissal from the service of the United States, and the fourth publication of sentence, had been carried out; and the relator contended that having thus paid a penalty which the court had power to inflict, he could not be held to submit to another penalty which the court had no power to add to the one already by it selected. Since the return was made the relator has also paid the fine, and although that fact does not appear upon the face of the original papers, it has been discussed in the briefs of both sides and is now embodied in a stipulation, thus completing the case.

If the relator's premises be sound, viz., that punishments have been imposed in the aggregate, when the statute authorized their imposition only in the alternative, his conclusion is supported by high authority, *Ex parte* Lang, 85 U. S., 163. In that case it was held that when a court has imposed fine and imprisonment, where the statute only conferred power to punish by fine or imprisonment, and the fine has been paid, and the judgment of the court thus executed so as to be a full satisfaction of one of the alternative penalties of the law, the power of the court as to that offense is at an end. The important question in the case, therefore, is
1801 whether under the statutes of the United States the court-martial had the power, under its findings, to impose a sentence inflicting these four penalties.

The relator was tried upon four separate charges, namely:

I. Conspiring to defraud the United States, in violation of the 60th article of war.

II. Causing false and fraudulent claims to be made against the United States, in violation of the 60th article of war.

III. Conduct unbecoming an officer and a gentleman, in violation of the 61st article of war.

IV. Embezzlement, as defined in section 5488, Revised Statutes of the United States, in violation of the 62d article of war.

He was found guilty of each of the four charges.

The 61st article of war provides that "any officer who shall be convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service." This is a provision only independent of the other definitions of offenses in the statute; the same course of conduct may constitute an offense elsewhere provided for and also may warrant a finding of guilty under the 61st. The 100th article of war provides that "when an officer is dismissed from the service for cowardice or fraud, the sentence shall further direct that the crime, punishment, name and place of abode of the delinquent shall be published in the newspapers," &c. This is a specific statutory penalty which must inevitably follow the conviction, the court-martial being given no option as to its infliction. It is plainly additional to the punishment imposed for the "cowardice or fraud" *per se*. It is understood that the relator does not now

contend that his dismissal and the publication of it is sufficient ground for his discharge. What the relator does contend is
1802 that, having paid the fine he is entitled to invoke the principle established in the Lange case, on the theory that the court-martial had authority under the 60th article to impose only a fine or imprisonment, not to impose both. It is manifest that he is in no position to press this argument unless he can dispose of the conviction and sentence under the fourth charge. That charge is, "embezzlement, as defined by sec. 5488 Revised Statutes of the United States, in violation of the 62d article of war."

The 62d article of war reads as follows:

"Art. 62. All crimes not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to prejudice of good order and military discipline, though not mentioned in the foregoing articles of war, are to be taken cognizance of by a general, or a regimental, garrison, or field-officers court-martial according to the nature and degree of the offense, and punished at the discretion of such court."

The language, the general structure and the specific provisions of this article indicate that it is a catch-all clause intended to cover offenses not already specifically provided for. The framers of the article wisely foresaw that there might be many crimes, disorders and neglects, which could not be classified under any enumeration already contained in the articles, and which, if a court-martial were left without power to deal with them, might operate to the prejudice of good order and military discipline. Therefore, having "mentioned" various offenses which might be cognizable by a court-martial and punished as prescribed, the framers of the articles further provided that "all" offenses of certain specified characters, "though not mentioned" might also be taken cognizance of by a court-martial and punished at its discretion. It would seem to follow that where an offense is found to be specifically provided for in
1803 any of the articles prior to the 62d, the grant of jurisdiction to try and punish such offense is conferred by the particular article which mentions it, and not by the general language of the 62d article. This proposition has commended itself to text writers (Davis Military Law, pp. 70–71; Winthrop's Military Law, 2d edition, pp. 1126–1127), and is in accord with general principles of statutory construction, U. S. *v.* Tynen, 11 Wall., 88; U. S. *v.* Auffmordt, 122 U. S., 197.

Section 5488 of the Revised Statutes reads as follows:

"SEC. 5488. Every disbursing officer of the United States who deposits any money intrusted to him in any place or in any manner, except as authorized by law, or converts to his own use in any way whatever, or loans with or without interest, or for any purpose not prescribed by law withdraws from the treasurer or any assistant treasurer, or any authorized depository, or for any purpose not prescribed by law, transfers or applies any portion of the public money intrusted to him, is, in every such act, deemed guilty of an embezzlement of the money so deposited, converted, loaned, withdrawn, transferred or applied; and shall be punished by imprisonment with

hard labor for a term not less than one year nor more than ten years, or by a fine of not more than the amount embezzled or less than one thousand dollars, or by both such fine and imprisonment (see secs. 3620, 5497)."

The particular clause which is germane to the facts in the cause at bar, as appears from the findings of the court-martial, which sustain the fourth charge upon the first specification alone, is the one reading, "Every disbursing officer of the United States who * * * for any purpose not prescribed by law transfers or applies any portion of the public money intrusted to him is * * * deemed guilty of an embezzlement." Obviously this is a crime, made so by this very section, and, unless already mentioned in the fore-
1804 going articles, would come within the provisions of the 62d.

The 60th article reads as follows (the numbers of the paragraphs being inserted here for convenience of reference):

"Article 60. Any person in the military service of the United States

1. Who makes or causes to be made any claim against the United States, or any officer thereof, knowing such claim to be false or fraudulent; or

2. Who presents or causes to be presented to any person in the civil or military service thereof, for approval or payment, any claim against the United States or any officer thereof, knowing such claim to be false or fraudulent; or

3. Who enters into any agreement or conspiracy to defraud the United States by obtaining, or aiding others to obtain, the allowance or payment of any false or fraudulent claim; or

4. Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance or payment of any claim against the United States or against any officer thereof, makes or uses, or procures or advises the making or use of, any writing, or other paper, knowing the same to contain any false or fraudulent statement; or

5. Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance or payment of any claim against the United States or any officer thereof, makes or procures or advises the making of, any oath to any fact or to any writing or other paper, knowing such oath to be false; or

6. Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance or payment of any claim against the United States or any officer thereof, forges or counterfeits, or procures
1805 or advises the forging or counterfeiting of, any signature upon any writing or other paper, or uses, or procures or advises the use of, any such signature, knowing the same to be forged or counterfeited; or

7. Who, having charge, possession, custody or control of any money or other property of the United States, furnished or intended for the military service thereof, knowingly delivers, or causes to be delivered, to any persons having authority to receive the same, any amount thereof less than that for which he receives a certificate or receipt; or

8. Who, being authorized to make or deliver any paper certifying

the receipt of any property of the United States, furnished or intended for the military service thereof, makes, or delivers to any person, such writing, without having full knowledge of the truth of the statements therein contained, and with intent to defraud the United States; or

9. Who steals, embezzles, knowingly and wilfully misappropriates, applies to his own use or benefit, or wrongfully or knowingly sells or disposes of any ordnance, arms, equipments, ammunition, clothing, subsistence stores, money or other property of the United States, furnished or intended for the military service thereof; or

10. Who knowingly purchases, or receives in pledge for any obligation or indebtedness, from any soldier, officer or other person who is a part of or employed in said forces or service, any ordnance, arms, equipments, ammunition, clothing, subsistence stores, or other property of the United States, such soldier, officer or other person not having lawful right to sell or pledge the same.

Shall, on conviction thereof, be punished by fine or imprisonment, or by such other punishment as a court-martial may adjudge. And if any person being guilty of any of the offenses aforesaid,
1806 while in the military service of the United States, receives his discharge or is dismissed from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court-martial in the same manner and to the same extent as if he had not received such discharge nor been dismissed."

When the 9th subdivision of the 60th article is compared with the above-quoted subdivision of section 5488 it will be observed that, save in one particular, the former is broad enough to contain the latter. A person who "for any purpose not prescribed by law transfers or applies any portion of the public money entrusted to him" certainly "misappropriates" or "wrongfully disposes" of the same. But sec. 5488 covers such improper disposition of any public money, while the 9th subdivision of article 60 relates only to "money * * * of the United States furnished or intended for the military service thereof." It appears from the specification that the money was part of the sum appropriated by the act of June 3, 1896, chapter 314, 29 Stat. at Large, pages 202, 208, which is one of the usual "river and harbor" acts. It enacts that the sums thereby appropriated are to be expended "for the construction, repair and preservation of the public works hereinafter named." The public works enumerated are devised and carried out to facilitate commerce, not for military purposes, and the only argument that is advanced to sustain the proposition contended for is that the Secretary of War is charged with the duty of making surveys of rivers and harbors, reporting as to what improvements therein shall best subserve the public interests and making contracts for the work, and that officers of the engineer corps are employed in taking charge of the execution of such contracts, and disbursing the money appropriated therefor. But although the trained skill of army officers is thus availed of to superintend the disbursement of money appropriated for the improvement of natural facilities for commercial in-
1807 tercourse, thus saving the expense of engaging such skill

elsewhere, it by no means follows that money so appropriated is "furnished or intended for the military service of the United States." The appropriation act for the fiscal year ending June 30, 1898—which contains a further appropriation for Savannah harbor—also contains under the heading "War Department" various items, to be expended under direction of the Secretary of War acting through officers of the army, and dealing with such public works as the care of the "Smithsonian grounds," the "laying asphalt walks around Judiciary square in the city of Washington," the "lighting of public grounds," and the "ordinary care of greenhouses and nursery at the Executive mansion." Surely these appropriations are not furnished or intended for "the military service," and appropriations for rivers and harbor improvements, are of the same class. It would seem to be a very strained construction of the act, which should hold that because the disbursing officer is himself in the military service of the United States, the money which he disburses must be held to have been "furnished or intended" for the military service, wholly irrespective of the purpose for which it is appropriated. It follows, therefore, that a court-martial would be without power to convict an officer of the army, under the 60th article, for knowingly or willfully misappropriating money of the United States, appropriated for—"furnished or intended for"—the improvement of rivers and harbors. Such an offense, however, falls clearly within the language of section 5488, and is therefore covered by the 62d article.

It must be held, therefore, that the court-martial, having found the relator guilty of the first specification under the fourth charge, and of that charge, has statutory authority under article 62 and section 5488, to impose a penalty of both fine and imprisonment. This conclusion leads to a dismissal of the writ. Counsel may attend at the opening of court on Monday at 10.30 a. m., when the order
1808 may be settled and signed, and in the event of an appeal being taken, the proper instructions upon remand, in conformity to the rules of the Supreme Court, may be given.

October 20th.

(Endorsed:) Circuit court of the United States for the southern district of New York. In the matter of a *habeas corpus* on the relation of Oberlin M. Carter. Opinion. Lacombe, C. J. U. S. circuit court. Filed Oct. 20, 1899. John A. Shields, clerk.

United States Circuit Court for the Southern District of New York.

In the Matter of the Petition of ABRAM J. ROSE for a Writ of *Habeas Corpus*.

And now comes the petitioner by Kellogg, Rose & Smith, his attorneys, in connection with the petition of appeal from the order entered October 23, 1899, dismissing the writ of *habeas corpus* herein, and directing that Oberlin M. Carter be returned to the custody from which he was taken for the purpose of suffering the punish-

ment imposed by the sentence of a general court-martial, convened by the President of the United States, in pursuance of which general orders No. 172 of the headquarters of the army were issued, and makes and files the following assignments of error:

The court erred in holding,

1st. That the said court-martial had jurisdiction to render the sentence imposed.

1809 2d. That the said Oberlin M. Carter was lawfully restrained of his liberty in and by virtue of the said sentence.

3d. That the said Oberlin M. Carter was not restrained in his liberty without due process of law, as required by the Constitution of the United States, and that he was not so detained contrary to the provisions of the said Constitution and the laws of the United States.

4th. That said general orders No. 172, headquarters of the army, were sufficient and lawful authority for the imprisonment and detention of the said Oberlin M. Carter in custody.

5th. That charge IV of the charges and specifications preferred against said Oberlin M. Carter, sufficiently charged an offense under the 62d article of war and did not charge an offense, if at all, under the 60th article of war.

6th. That said Oberlin M. Carter was amenable to further punishment under the sentence imposed by the court-martial after he had been dismissed from the military service, and the order of his dismissal personally served upon him.

By reason whereof, the petitioner prays that the said order directing that Oberlin M. Carter be remanded to the custody of Captain Benjamin K. Robersts, captain Fifth artillery, at Fort Columbus, be reviewed, and that said Oberlin M. Carter be discharged from custody.

ABRAM ROSE, *Petitioner.*

(Endorsed:) U. S. circuit court, southern district of New York. In the matter of the application of O. M. Carter. Assignment of errors. Kellogg, Rose & Smith, att'ys for petitioner, 120 1810 Broadway, New York. A copy of the within paper has been this day received at this office, Oct. 23, 1899. Henry L. Burnett, U. S. attorney. U. S. circuit court. Filed Oct. 23, 1899. John A. Shields, clerk.

United States Circuit Court, Southern District of New York.

In the Matter of the Petition of ABRAM J. ROSE for a Writ of *Habeas Corpus* for Oberlin M. Carter.

To the honorable the judges of the circuit court of the United States for the second circuit in and for the southern district of New York:

The petition of Abram J. Rose respectfully shows:

First. That by virtue of general order, No. 172, headquarters of

the army, Adjutant General's Office, Oberlin M. Carter has been committed and is detained by virtue of a sentence imposed upon him by a general court-martial, convened by the President of the United States, which said sentence is as follows:

"And the court does, therefore, sentence the accused, Captain Oberlin M. Carter, Corps of Engineers, United States Army, to be dismissed from the service of the United States, to suffer a fine of five thousand dollars, to be confined at hard labor at such
1811 place as the proper authority may direct for five years and the crime, punishment, name and place of abode of the accused to be published in the newspapers in and about the station and the State from which the accused came or where he usually resides, and by virtue of said order No. 172, said Oberlin M. Carter was imprisoned and is restrained in his liberty in the custody of Captain Benjamin K. Roberts in Castle William, Governor's island, in the southern district of New York, in the custody of Captain Benjamin K. Roberts, captain Fifth artillery commanding Fort Columbus, New York."

Second. That the cause or pretense of the imprisonment and restraint according to the best knowledge and belief of the petitioner, is that charges and specifications were preferred against said Oberlin M. Carter under the articles of war, as contained in the Revised Statutes of the United States, charging the accused with conspiracy in violation of the 60th article of war and in presenting false claims in violation of said 60th article of war and with embezzlement, as defined in section 5488 of the Revised Statutes of the United States purporting to be in violation of the 62d article of war and with conduct unbecoming an officer and a gentleman, in violation of the 61st article of war, in pursuance of which charges and specifications, proceedings were had before the said general court-martial convened as aforesaid, which terminated in the sentence above mentioned.

Third. That thereafter your petitioner applied for and obtained from this court a writ of *habeas corpus* for the discharge of the said Oberlin M. Carter on the ground that the court had no jurisdiction to render the sentence imposed and the imprisonment and detention of said Oberlin M. Carter was without authority of law, and contrary to the provisions of the Consitution of the United States
and was illegal.
1812 That after the hearing by the court, an order was entered herein as of the 23d day of October, 1899, dismissing the writ herein and directing that said Oberlin M. Carter be remanded to the custody from which he was taken.

Wherefore your petitioner, feeling himself aggrieved by said order, appeals therefrom to the circuit court of appeals of the United States in and for the second circuit, and prays that this appeal may be allowed, and that a transcript of said order and the return of said Benjamin K. Roberts, captain Fifth artillery, commanding Fort Columbus, New York, to said writ and the traverse of this petitioner

thereto, may be transmitted to the said circuit court of appeals for review therein.

Dated New York, October 23, 1899.

ABRAM J. ROSE,
KELLOGG, ROSE & SMITH,
Att'ys for Petitioner.

ABRAM J. ROSE, *Of Counsel.*

Petition of appeal allowed.

E. HENRY LACOMBE,
U. S. Circuit Judge.

(Endorsed:) U. S. circuit court, south. dist. of N. Y. In the matter of the application of O. M. Carter. Petition for appeal. Kellogg, Rose & Smith, att'ys for petitioner, 120 Broadway, New York. A copy of the within paper has been this day received at this office. Oct. 23, 1899. Henry L. Burnett, U. S. att'y. U. S. circuit court. Filed Oct. 23, 1899. John A. Shields, clerk.

1813 United States Circuit Court, Southern District of New York.

In the Matter of the Petition of ABRAM J. ROSE for a Writ of *Habeas Corpus* for Oberlin M. Carter.

Know all men by these presents that we, Abram J. Rose, as principal, and Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto the United States in the full and just sum of two hundred and fifty ($250) dollars, to be paid to the said United States, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 23d day of October, 1899.

Whereas, lately at a circuit court of the United States for the southern district of New York, in a proceeding therein pending, an order was entered directing the return of Oberlin M. Carter to the custody of Captain Benjamin K. Roberts, captain Fifth artillery, commanding Fort Columbus, New York, for the purpose of serving the sentence imposed by a general court-martial convened by the President of the United States, in pursuance of which general order No. 172, was issued for the punishment of said Oberlin M. Carter, as directed by said sentence, and the said Abram J. Rose having obtained an appeal and filed copy thereof in the clerk's office of the said court to review said order:

1814 Now the condition of the above obligation is such, that if the said Abram J. Rose shall prosecute said appeal to effect, and shall answer all costs if he shall fail to make the said appeal good, then the above obligation to be void, else to remain in full force and effect.

ABRAM J. ROSE. [SEAL.]
FIDELITY AND DEPOSIT COMPANY OF MARYLAND, [SEAL.]
By HENRY B. PLATT, *Vice-President.*
Attest: JOHN W. WOOTEN, *Attorney.*

(Stamp.)

Sealed and delivered and taken and acknowledged, this 23d day of October, 1899.

ROBT LAWRENCE,
Notary Public, N. Y. Co.

STATE OF NEW YORK, }
County of New York, } *ss.:*

On the 23d day of October, in the year 1899, before me personally came Henry B. Platt, to me known, who, being by me duly sworn, did depose and say: That he resided in the city of New York; that he was the vice-president of the Fidelity and Deposit Company of Maryland, the corporation described in, and which executed the within instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order; and
1815 that the liabilities of said company do not exceed its assets as ascertained in the manner provided in section 3 of chapter 720 of the Session Laws of the State of New York for the year 1893. And the said Henry B. Platt further said, that he was acquainted with John W. Wooten, and knew him to be the attorney of said company; that the signature of the said John W. Wooten, subscribed to the within instrument, was in the genuine handwriting of said John W. Wooten, and was subscribed thereto by like order of the board of directors, and in the presence of him, the said Henry B. Platt.

[SEAL.]

ERNEST L. HICKS,
Notary Public, New York County.

At a regular meeting of the board of directors of the Fidelity and Deposit Company of Maryland, held at the office of the company, in the city of Baltimore, State of Maryland, on the first day of June, 1898, at which a quorum of said directors, duly authorized to act in the premises, on motion it was unanimously

"Resolved, That in pursuance of section eight hundred and eleven of the Code of Civil Procedure of the State of New York, Henry B. Platt, vice-president, or John W. Wooten, attorney, or Frank H. Platt, Theodore F. Wood, Edward T. Platt, Joseph A. Flynn, and Hugh M. Allwood, attorneys-in-fact of this company in the State of New York, be, and each of them is, hereby authorized and empowered to sign, execute and deliver any and all bonds or undertakings for or on behalf of this company, and to attach thereto the seal of the corporation, the same to be attested by the said John W. Wooten, attorney of the company, or by either one of the other persons above named, as occasion may require."

1816 COUNTY OF NEW YORK, *ss.:*

I, John W. Wooten, attorney of the Fidelity and Deposit Company of Maryland, have compared the foregoing resolution with the original thereof, as recorded in the minute book of said company, and do hereby certify that the same is a true and correct transcript there-

from and of the whole of the said original resolution. Given under my hand and seal of the company, at the city of New York, this 23d day of October, 1899.

[SEAL.] JOHN W. WOOTEN, *Attorney.*

Fidelity and Deposit Company of Maryland.

Statement, March 30, 1899.

Resources.

Real estate	$600,000 00	
Stocks and bonds	1,541,527 00	
Railroad bonds	1,171,077 50	
Net premiums due	153,824 13	
Cash in bank, &c	630,664 37	
		$4,097,093 20

Liabilities.

Capital stock	$1,500,000 00	
Surplus and undivided profits	2,012,902 22	
Premium reserve	552,104 50	
Claims in process of adjustment	7,020 72	
Claims reported. Proof not filed	25,065 76	
		$4,097,093 20

1817 STATE OF NEW YORK, } ss:
County of New York, }

John W. Wooten, being duly sworn, says: That he is the attorney of the Fidelity and Deposit Company of Maryland; that the foregoing is a true and correct statement of the financial condition of said company, as of March 30, 1899, to the best of his knowledge and belief, and that the financial condition of said company is as favorable as it was when such statement was made.

JOHN W. WOOTEN.

Subscribed and sworn to before me this 23d day of October, 1899.

ERNEST L. HICKS,
Notary Public, New York County.

[SEAL.]

Whereas, the Fidelity and Deposit Co. of Maryland, a corporation duly incorporated under the laws of the State of Maryland, has appointed an agent as required by section 2 of the act of August 13, 1894, entitled "An act relative to recognizances, stipulations, bonds, and undertakings, and to allow certain corporations to be accepted as surety thereon;" and has deposited with me its charter or articles of incorporation and the statement required by section 3 of said act; and has satisfied me that it has authority under said charter to do business provided for in said act; that it has a paid-up capital of not less than $250,000 in cash or its equivalent, and that it is able to keep and perform its contracts:

Now, therefore, the requirements of said act preliminary to the

transaction of business thereunder in the above and all other particulars having been fully complied with, the said Fidelity
1818 and Deposit Co. of Maryland is hereby granted authority to do business under said act.

Department of Justice, Washington, D. C., August 28, 1894.

RICHARD OLNEY,
[SEAL.] *Attorney General.*

DEPARTMENT OF JUSTICE,
WASHINGTON, D. C., *Sept.* 16, 1899.

The annexed is a true copy of an original authorization to do business, issued by the Attorney General under the act of Congress approved August 13, 1894.

Witness my hand and the seal of the department.

CECIL CLAY,
[SEAL.] *Chief Clerk.*

(Stamp.)

(Endorsed:) United States circuit court, so. dist. of New York. In the matter of the application of Oberlin M. Carter. Bond. Kellogg, Rose & Smith, att'ys for petitioner, 120 Broadway, New York. The within bond approved as to form, sufficiency of surety, and manner of execution. E. Henry Lacombe, U. S. circuit judge. U. S. circuit court. Filed Oct. 23, 1899. John A. Shields, clerk.

UNITED STATES OF AMERICA, *ss:*

To the United States of America and Captain Benjamin K. Roberts, captain Fifth artillery, commanding Fort Columbus, New York:

You are hereby cited and admonished to be and appear before the United States circuit court of appeals for the second circuit, at the city of New York, on the 20th day of November, 1899, pursuant to an appeal on the part of Abram J. Rose, filed in the clerk's
1819 office of the circuit court of the United States for the southern district of New York in a certain suit or proceeding, entitled "In the matter of the petition of Abram J. Rose for a writ of *habeas corpus*" to show cause, if any there be, why the decision of the United States circuit court, in the said appeal mentioned, should not be reversed, modified or corrected and speedy justice should not be done in that behalf.

Given under my hand at the city of New York, in the southern district of New York, on the 23d day of October, 1899.

E. HENRY LACOMBE,
Judge of the United States Circuit Court of Appeals for the Second Circuit.

KELLOGG, ROSE & SMITH,
Att'ys for Appellant.

(Endorsed:) U. S. circuit court, southern district of New York. In the matter of the application of O. M. Carter. Original citation.

Kellogg, Rose & Smith, att'ys for petitioner, 120 Broadway, New York. A copy of the within paper has been this day received at this office, Oct. 23, 1899. Henry L. Burnett, U. S. attorney. U. S. circuit court. Filed Oct. 23, 1899. John A. Shields, clerk.

1820 United States Circuit Court of Appeals, Second Circuit.

ROSE *ex Rel.* CARTER, Appellant,
vs.
ROBERTS, Appellee.

WALLACE, *Circuit Judge:*

This appeal presents for review an order of the circuit court of the United States for the southern district of New York dismissing a writ of *habeas corpus*. The writ was obtained in behalf of Oberlin M. Carter on a petition alleging that the relator was unlawfully imprisoned pursuant to a sentence of a court-martial.

It appears by the record that the relator was a captain in the Corps of Engineers, United States Army, was convicted by the court-martial of four different offences committed by him while in military service of the United States, viz: conspiring to defraud the United States, in violation of the 60th article of war; causing false and fraudulent claims to be made against the United States, in violation of the 60th article of war; conduct unbecoming an officer and a gentleman, in violation of the 61st article of war; and embezzlement, as defined in section 5488 Revised Statutes of the United States, in violation of the 62nd article of war. He was thereupon sentenced by the court-martial to suffer a fine of $5,000; to
1821 be imprisoned at hard labor for five years; to be dismissed from the service of the United States; and to the publication of his crime and punishment as prescribed by statute upon a dismissal for fraud. The findings and sentence of the court-martial were approved by the Secretary of War and confirmed by the President; and before the institution of the proceedings under review the relator had paid the fine imposed by the sentence, and had been dismissed from the service of the United States.

It is not the office of a writ of *habeas corpus* to perform the functions of a writ of error in reviewing the judgment of a court-martial. Courts-martial are tribunals created by Congress in pursuance of the power conferred by the Constitution, and have as plenary jurisdiction of offenses committed to them by the law military as do the circuit and district courts of the United States in the exercise of their statutory powers over other offences. The question of jurisdiction may be reached by such a writ, as it may be when the judgment of any tribunal is attacked; but the range and scope of the inquiry is controlled by the same rules and limitations in either case. There must be jurisdiction to hear and determine, and to render the particular judgment or sentence imposed; but if this exists, however erroneous the proceedings may be, they cannot be reviewed collaterally or redressed by *habeas corpus*. These principles have

been repeatedly declared by the authorities. *In re* Davidson (31 Fed. Rep., 618); *Ex parte* Reed (100 U. S., 13); *In re* Coy (127 U. S., 731); *Ex parte* Yarborough (110 U. S., 651); U. S. *v.* Pridgeon (153 U. S., 59).

It is not contended for the appellant that the court-martial did not have jurisdiction of the person of the accused and of the offences of which he was convicted; but it is insisted that the court transcended its power in the imposition of punishment. More specifically the contention for the appellant is that, while it was within the competency of the court-martial to try and punish the relator for the offences in violation of the 60th article of war of which
1822 he was convicted, the court exceeded its authority when it punished him by fine and imprisonment instead of fine or imprisonment; and that the conviction and sentence for the offence alleged to be in violation of the 62d article of war were void, because the facts charged did not constitute an offence against that article.

If the sentence was in excess of the authority conferred upon the court by the articles of war enacted by Congress, it was to that extent void, as the court would have gone beyond its jurisdiction in imposing punishment. On the other hand, if the authority of the court extended to the punishment of the relator by fine and imprisonment upon his conviction of the two offences in violation of the 60th article of war, the sentence defeats any remedy by the writ of *habeas corpus*, as that remedy reaches only cases of unlawful imprisonment, and it matters not for present purposes whether the authority of the court extended to his conviction and sentence for any other offence. There being no statutory direction upon the subject, usage permits an indefinite number of offenses to be adjudicated together in one proceeding by courts-martial, and the rendition of a single sentence covering all the convictions and imposing punishment accordingly, however separate and distinct may be the different offences, and however different may be the punishments prescribed for them. 1 Winthrop, Military Law, 2nd ed. (219, 614); Davis Military Law (148, 689). It follows that if the sentence is warranted by a conviction of two offences, it is justified to the extent that such offences are punishable.

The 60th article of war declares, among other things, that a person in the military service of the United States "who enters into any agreement or conspiracy to defraud the United States by obtaining, or aiding others to obtain, the allowance of any false or fraud-
1823 ulent claim;" or "who makes, or causes to be made, any claim against the United States, or any officer thereof knowing such claim to be false or fraudulent," * * * "shall on conviction thereof be punished by fine or imprisonment, or by such other punishment as a court-martial may adjudge." The article, besides the two offences mentioned, defines disjunctively eight others, and the language prescribing the punishment is contained in a concluding clause at the end of the enumeration. We entertain no doubt that the concluding clause is to be read distributively, and applies to each of the ten enumerated offences; and that a per-

son convicted of two or more of the ten offences is by its terms punishable for each by fine, or by imprisonment, or by such other punishment as the court-martial may adjudge. Any other construction would attribute to Congress the intention to ignore any distinction between degrees of guilt in punishing crime, and to subject a person guilty of one offence to the same measure of punishment as one guilty of several or of all of the ten offences.

As has been stated, the relator was convicted of two of the offences defined by the 60th article of war. The record presents the charges and specifications upon which he was found guilty of those offences. The charges describe each offence in the language of the article. Whether the specifications support the charges, or the evidence supports the specifications, we are not at liberty to consider. Nor is it open to inquiry whether the two offences were in fact but one and the same criminal act. When properly constituted and convened a court-martial has jurisdiction to hear and determine the question whether the accused is guilty of any of the offences created by the articles of war. This jurisdiction necessarily includes the authority to decide, when the charge preferred against the accused is the commission of one or more of these offences, whether the specifications and the evidence sufficiently exhibit the incriminating facts. As was said by the Supreme Court in Dynes *v.* Hoover (20 How., 1824 65), the sentence (when confirmed by the President) "is altogether beyond the jurisdiction or inquiry of any civil tribunal whatever, unless it shall be in a case in which the court had no jurisdiction over the subject-matter or charge, or one in which having jurisdiction over the subject, it has failed to observe the rules prescribed by statute for its exercise." Having found the relator to be guilty of two offences, the court was empowered by the statute to punish him as to one by fine, and as to the other by imprisonment. The sentence was not in excess of its authority.

It is proper to state that the other punishments imposed upon the relator by the sentence were authorized by the articles of war. The conviction of conduct unbecoming an officer and gentleman was for an offence in violation of article 61; and that article requires that upon conviction the officer be dismissed from the service. The punishment by publication of his crime was authorized by article 100, which provides for such punishment when an officer is dismissed from the service for cause. It is also proper to state that Congress can, if it sees fit, carve out two or more offences from a single criminal transaction, and impose cumulative punishments for the different offences (Commonwealth *v.* Trickey, 95 Mass., 559; United States *v.* Harmison, 3 Sawyer, 556), and if the court-martial convicted the relator of several offences for a single criminal transaction it did not transcend necessarily the power conferred by the 60th article of war.

The appellant has urged the proposition that the relator, having been dismissed from the service, was not thereafter amenable to military authority. If by this it is meant to be said that he was no longer lawfully in custody under the sentence of imprisonment, the proposition has not sufficient color of merit to require discussion.

In dismissing the writ the court below expressed the opinion that the relator was properly convicted by the court-martial of an
1825 offence in violation of the 62d article of war, and that the sentence of imprisonment was supported by such conviction. Without intending to impugn the correctness of this conclusion, we have not considered the question, because in the view we have reached it does not arise. The relator was lawfully restrained of his liberty by the sentence and commitment pursuant to it, because the sentence was warranted both as to fine and imprisonment by his conviction of one offence, subjecting him to punishment by fine, and of another subjecting him to punishment by imprisonment, and both in violation of the 60th article of war.

The order dismissing the writ of *habeas corpus* is affirmed, with costs.

UNITED STATES OF AMERICA, }
Southern District of New York, } *ss:*

—, William Parkin, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 82, inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of Oberlin M. Carter, on petition of A. J. Rose, plaintiff in error, against Benjamin K. Roberts, defendant in error, as the same remain of record and on file in my office.

1826–2050 In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 26th day of January, in the year of our Lord one thousand nine hundred, and of the Independence of the United States the one hundred and twenty-fourth.

[SEAL.] WM. PARKIN, *Clerk.*

(10c. I. R. stamp.)

* * * * * * *

2051 United States Circuit Court for the Southern District of New York.

In the Matter of the Petition of ABRAM J. ROSE for a Writ of *Habeas Corpus.*

And now comes the petitioner, by Kellogg, Rose & Smith, his attorneys, in connection with the petition of appeal from the order and judgment entered October 23, 1899, dismissing the writ of *habeas corpus* herein and directing that Oberlin M. Carter be returned to the custody from which he was taken for the purpose of suffering the punishment imposed by the sentence of a general court-martial, convened by the President of the United States, in pursuance of which general orders No. 172 of the head-
2052–2112 quarters of the army were issued, and makes and files the following assignments of error:

The court erred in holding:

1st. That the said court-martial had jurisdiction to render the sentence imposed.

2nd. That the said Oberlin M. Carter was lawfully restrained of his liberty in and by virtue of the said sentence.

3rd. That the said Oberlin M. Carter was not restrained in his liberty without due process of law, as required by the Constitution of the United States, and that he was not so detained contrary to the provisions of the said Constitution and the laws of the United States.

4th. That said general orders No. 172, headquarters of the army, were sufficient and lawful authority for the imprisonment and detention of the said Oberlin M. Carter in custody.

5th. That charge IV of the charges and specifications charged an offense under the 62nd article of war, and did not charge an offense, if at all, under the 60th article of war.

6th. That said Oberlin M. Carter was amenable to further punishment under the sentence imposed by the court-martial after he had been dismissed from the military service, and the order of his dismissal personally served upon him.

7th. The court erred in dismissing the writ and remanding the prisoner for the reason that it clearly appears that the sentence of the court-martial to imprisonment was void and against the provisions of the Constitution, in that by the sentence of imprisonment the prisoner was punished twice for the same offense.

By reason whereof the petitioner prays that the said order directing that Oberlin M. Carter be remanded to the custody of Captain Benjamin K. Roberts, captain Fifth artillery, at Fort Columbus, be reviewed, and that said Oberlin M. Carter be discharged from custody.

ABRAM J. ROSE, *Petitioner.*

(Endorsed:) U. S. circuit court, southern district of New York. In the matter of the petition of Abram J. Rose for a writ of *habeas corpus* for Oberlin M. Carter. Assignment of errors. Kellogg, Rose & Smith, att'ys for petitioner, 120 Broadway, New York. A copy of the within paper has been this day received at this office, Feb. 26, 1900. Henry L. Burnett, U. S. attorney. U. S. circuit court. Filed Feb. 26, 1900. John A. Shields, clerk.

2113 In the Circuit Court of the United States for the District of Kansas, First Division.

OBERLIN M. CARTER, on the Petition of I. STANTON CARTER, Petitioner,
vs.
ROBERT W. MCCLAUGHRY.

The United States of America to Robert W. McClaughry, warden of the United States penitentiary at Fort Leavenworth, Kansas:

We command you that the body of Oberlin M. Carter, in your custody detained, as it is said, together with the day and cause of

his caption and detention, you safely have before the circuit court of the United States for the district of Kansas, first division, at the United States court-room, in the city of Leavenworth, State of Kansas, on the 26th day of October, A. D. 1900, at 10 o'clock a. m. of said day, then and there to do all and singular those things which the said court shall then and there consider of him in this behalf; and have you then and there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States; attested by the seal of said court, at Leavenworth, Kansas, this 17th day of October, in the year of our Lord one thousand nine hundred.

GEO. F. SHARITT, *Clerk.*

Endorsed: No. 7849. Oberlin M. Carter, on the petition of I. Stanton Carter, petitioner, *vs.* Robert W. McClaughry. (Copy.) *Habeas corpus.*

U. S. Marshal's Return.

Received the original writ, of which this is a copy, on the 17th day of October, A. D. 1900, and executed the same by delivering the said original writ to R. W. McClaughry, the warden of the penitentiary named within, at the city of Leavenworth, Kansas, on the 18th day of October, A. D. 1900.

W. E. STERNE,
U. S. Marshal,
By D. N. WILLITS, *Deputy.*

Fees, $2.00, pd. by petitioner.

Filed Dec. 10, 1900.

GEO. F. SHARITT, *Clerk.*

2114 In the Circuit Court of the United States for the District of Kansas.

OBERLIN M. CARTER, on the Petition of I. STANTON CARTER, Petitioner,
vs.
ROBERT W. MCCLAUGHRY, Respondent.

Frank P. Blair and C. H. Grosvenor, for petitioner.
John W. Claus, deputy judge advocate general, for respondent.

Before Thayer, circuit judge, and Hook, district judge.

HOOK, district judge, delivered the opinion of the court:

This is a proceeding in *habeas corpus*. The writ having been allowed, the cause arises on petitioner's demurrer to the return thereto. Oberlin M. Carter, who was a captain in the Corps of Engineers of the United States Army, was tried before a general court-martial which convened at Savannah, Georgia, upon four charges of violation of the articles of war and thirty-seven specifications thereunder. He was found guilty of the offenses set forth in

sixteen of the specifications and of the four charges which the specifications supported. In accordance with the practice in such tribunals, the court-martial imposed a lumping sentence and adjudged the accused "to be dismissed from the service of the United States, to suffer a fine of five thousand dollars, to be confined at hard labor at such place as the proper authority may direct for five years, and the crime, punishment, name, and place of abode of the accused to be published in the newspapers in and about the station and in the State from which the accused came or where he usually resides." As required by law, the record of the proceedings before the court-martial was submitted to the President for his action thereon. The President disapproved of the findings of the court-martial as to twelve of the sixteen specifications and approved of the remainder and also of the sentence. The action of the President left in force the findings of guilty under the four charges and one specifi-
2115 cation supporting each charge, and although the determination of the court-martial as to twelve of the specifications was set aside, no diminution was made in the punishment that had been imposed. The Secretary of War thereupon designated the United States penitentiary at Fort Leavenworth, Kansas, as the place of confinement of the prisoner, and he is now in the custody of the warden of that institution, who is the respondent herein. The entire sentence, excepting the service of the term of imprisonment, has been executed—the relator has been dismissed from the service of the United States, he has paid the fine imposed, and the specified publication has been made.

Prior to Carter's removal to the penitentiary at Fort Leavenworth a writ of *habeas corpus* was obtained in his behalf from the circuit court of the United States for the southern district of New York. Upon hearing, the writ was dismissed and he was remanded to the custody of the military authorities (*In re* Carter, 97 Fed., 496). An appeal from the order dismissing the writ was taken to the circuit court of appeals for the second circuit, and that court affirmed the judgment of the circuit court (Rose *v.* Roberts, 99 Fed., 948; 40 C. C. A., 199). A petition for a writ of certiorari to the circuit court of appeals was presented to the Supreme Court and was by that court denied (Carter *v.* Roberts, 176 U. S., 684). At the same time an appeal directly to the Supreme Court and also a writ of error were allowed by a judge of the circuit court, which, upon hearing, were dismissed (Carter *v.* Roberts, 177 U. S., 496). The Supreme Court in dismissing the appeal and proceeding in error did not pass upon the questions affecting the validity of the conviction and sentence of Carter, but held that since an appeal had been prosecuted from the circuit court to the circuit court of appeals, and that court had acted on the whole case, including the constitutional questions connected therewith, the Supreme Court would not entertain a direct appeal from the circuit court in the same cause. In other words, it was held that a defeated party did not have the right to have
2116 his case finally determined in the Supreme Court and in the circuit court of appeals on independent appeals.

Being restrained of his liberty by the respondent pursuant to the

sentence of the court-martial as approved by the President and the action of the Secretary of War thereon, it is contended in behalf of Carter that his imprisonment is in violation of the Constitution of the United States and is otherwise illegal and without warrant of law.

At the threshold of the case counsel for respondent interposes the objection that by reason of the aforementioned proceedings in the courts and the orders and judgments rendered by them respectively the matters sought to be presented by petitioner are *res adjudicata*, and that this court is precluded from re-examining them.

It is true, the merits of Carter's case as presented were considered by the circuit court for the southern district of New York and by the circuit court of appeals for the second circuit, but while the judgments of those courts are recognized as of highly persuasive authority, they do not amount to *res adjudicata* nor prevent a re-examination of the same questions in a subsequent *habeas corpus* proceeding. The action of the Supreme Court was confined to a denial of the application for a writ of certiorari, which is not allowed as a matter of right, and to a dismissal of the appellate proceedings without a consideration of the merits of the case. It is, therefore, the duty of this court to give due consideration to the case presented.

The limited scope of inquiry in a case of this character is well defined by many decisions. A writ of *habeas corpus* cannot be converted into a proceeding in error. A court to which an application is made for the discharge of one restrained of his liberty pursuant to the judgment and sentence of another court cannot inquire whether the evidence was sufficient to warrant a conviction, nor consider whether in the progress of the trial errors were committed by the trial court as to matters within its jurisdiction. In such a case the writ of *habeas corpus* is in effect a collateral attack, and if the court pronouncing the sentence had jurisdiction of the accused and of the offense for which he was tried, and did not exceed its jurisdiction in the imposition of the sentence, the case is not open to further inquiry. Courts-martial are independent tribunals
2117 created by the same authority to which this court owes its existence, and they have as complete power and jurisdiction to judicially determine any cause before them involving offenses under the articles of war as this court has over controversies committed by law to its cognizance. The limitations on the power of this court to inquire into matters connected with the judgments of other civil courts by means of the writ of *habeas corpus* apply with equal force to the judgments of courts-martial. This consideration is sufficient to eliminate a number of petitioner's objections without further discussion.

The charges preferred against Carter before the court-martial, and of which he was found guilty, were: (1) Conspiracy to defraud the United States, in violation of the sixtieth article of war; (2) causing false and fraudulent claims to be made against the United States, in violation of the sixtieth article of war; (3) conduct unbecoming an officer and a gentleman, in violation of the sixty-first article of war; (4) embezzlement, as defined in section 5488, Revised

Statutes of the United States, in violation of the sixty-second article of war.

It is not denied that the court-martial by which Carter was tried had jurisdiction of his person; but it is contended that the finding of guilty under the fourth charge is illegal and void, in that the acts described in the specification supporting the charge are insufficient to constitute the offense, and that they show that the offense, if any was committed, was cognizable under the sixtieth article of war, for the violation of which a less punishment is prescribed than that inflicted; also that the first two charges constitute offenses against the sixtieth article of war, under which the punishment prescribed is fine or imprisonment, in the alternative, but not cumulatively; also that the charges and specifications show that a single act, viz., the drawing of two checks, has been carved up into several distinct and separate crimes and a punishment assessed on each, and that therefore he has been tried more than once for the same offense; also that when the President disapproved of certain of the findings of the court-martial there should have been, by
2118 some competent authority, an appropriate diminution of the sentence as pronounced by that court. No serious contention is made as to the finding of guilty of the third charge, if the proceedings as to any of the other charges are upheld. First, as to the objections connected with the fourth charge, which is that of embezzlement, as defined in section 5488, Revised Statutes of the United States, in violation of the sixty-second article of war. Section 5488, so far as concerns the contention in question, is as follows:

"Every disbursing officer of the United States who * * * for any purpose not prescribed by law transfers or applies any portion of the public money intrusted to him, is, in every such act, deemed guilty of an embezzlement of the money so * * * transferred or applied."

The sixty-second article of war provides that "All crimes not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing articles of war, are to be taken cognizance of by * * * court-martial, * * * and punished at the discretion of such court." Sec. 1342, Rev. St.

Were the facts set forth in the specification supporting the fourth charge sufficient to constitute the offense charged and was the conduct described "to the prejudice of good order and military discipline," as required by the sixty-second article of war? The specification set forth that Carter was a disbursing officer of the United States, and that as such officer he was intrusted with certain public money which he wilfully and knowingly caused to be paid on false accounts, the amounts paid not being due or owing from the United States to the parties to whom the payments were made, of which Carter well knew. In my opinion this charges the application of public money to "a purpose not prescribed by law," and, with the details which the specification supplies, constitutes a sufficient indictment under section 5488 of the Revised Statutes. And it may also reasonably be contended that in a larger sense the misappropriation by a

captain in the engineer corps of the army of public money intrusted to him to be used in the construction of works of which he has official charge is conduct prejudicial to good order and
2119 military discipline. But even if petitioner's contention in these respects were well made, it does not show the sentence to be void, but simply that it is erroneous. It was clearly within the province of the court-martial to decide those particular questions—that is to say, whether the money mentioned was or was not applied to a purpose prescribed by law, and whether such a misappropriation under the particular circumstances of the case was or was not prejudicial to good order and military discipline, and its determination thereof, even if erroneous, cannot be reviewed by *habeas corpus*. In *Ex parte* Parks, 93 U. S., 18, the court said: "But the question whether it was or was not a crime within the statute was one which the district court was competent to decide. It was before the court and within its jurisdiction. * * * Whether an act charged in an indictment is or is not a crime by the law which the court administers (in this case the statute law of the United States) is a question which has to be met at almost every stage of criminal proceedings; on motions to quash the indictment, on demurrers, on motions to arrest judgment, &c. The court may err, but it has jurisdiction of the question. If it errs, there is no remedy after final judgment, unless a writ of error lies to some superior court: and no such writ lies in this case." *Ex parte* Yarbrough, 110 U. S., 651; *Ex parte* Bigelow, 113 U. S., 328; Swain *v.* United States, 165 U. S., 561; *In re* Boyd, 49 Fed., 48.

It is also contended that under the sixty-second article of war no charge can be preferred that is embraced in any other article, and that, as the charge is that of embezzlement, it is covered by either the first, fourth, or ninth paragraph of the sixtieth article of war. Assuming but not deciding that no charge can be laid under the sixty-second article of war if it is mentioned in any preceding article, still it is apparent that the embezzlement defined in section 5488, Revised Statutes, is not the offense denounced in either the first or fourth paragraphs referred to, and I am also of the opinion that it is a species of embezzlement different from that defined in the ninth paragraph of the sixtieth article of war, since the money which is the subject of embezzlement under the latter article is "money furnished for
2120 military service," whereas under section 5488 the term money comprehends any public money, whether appropriated for the military service or for other purposes. The offense denounced in section 5488 is much broader and more comprehensive than the other, the former being the application by a disbursing officer of money to any authorized purpose, whilst under the ninth paragraph mentioned the money which is the subject of the embezzlement is money appropriated specifically for the military service, and it is quite probable from the context of the entire paragraph that the term "embezzlement," as there employed, means such an offense as is generally understood where one having the money of another in his custody appropriates it to his own use with felonious intent, intending to deprive the true owner thereof.

The result of these conclusions is that the sentence imposed may be upheld by the conviction under the fourth charge alone, since the punishment authorized by the sixty-second article of war is left to the discretion of the court, subject to the review of the President.

But the decision need not be based upon the regularity of the conviction under the fourth charge alone. There was also a conviction under the first charge for a conspiracy to defraud the United States and a conviction under the second charge for causing false and fraudulent claims to be made, such charges being the subjects of the first and third paragraphs of the sixtieth article of war. I am in entire accord with Judge Wallace, who delivered the opinion of the circuit court of appeals for the second circuit, that under the sixtieth article it was competent to impose a fine for one charge of which the accused was found guilty, and imprisonment for the other. Therefore the entire sentence as ultimately pronounced and confirmed can be sustained under the sixtieth article of war without reference to the sixty-second, and for that reason no relief is possible by the writ of *habeas corpus*. Every presumption must be indulged in in favor of the judgment of the court-martial; and even if the conviction under the fourth charge were void, it should be presumed that the fine relates to the conviction under one of the first two charges and the imprisonment under the other. 212:1 Under the procedure of courts-martial it was not required to be stated that the fine was imposed for conspiracy and the imprisonment for the causing of false and fraudulent claims to be made, or *vice versa*. If the court might have imposed sentence in that manner it must be presumed that it did so impose it.

Nor is the contention well made that Carter committed but one offense, which has been split up into several charges and punishment inflicted therefor.

A "conspiracy to defraud," as alleged in the first charge, and "causing false and fraudulent claims to be made," as alleged in the second charge, and "the statutory embezzlement under section 5488," as alleged in the fourth charge, are separate and distinct offenses dependent upon different facts and requiring different proof, and therefore it cannot be said that for the same act the accused has been tried and punished three times. The mere fact that certain acts of the accused are set out in all of the specifications supporting the three charges does not destroy the distinctive character of the offenses charged.

It is also contended that since Carter was found guilty under sixteen specifications, and upon review thereof by the President twelve were set aside, but no change was made in the sentence imposed by the court-martial, the sentence is void. The punishment prescribed by the articles of war is attached to the charges and not to the specifications made thereunder, the latter being merely by way of exemplification and detailed statement of the principal charges to which they respectively relate; but even if this were not so, the rule is well established that where a sentence in gross is pronounced upon a conviction under an indictment containing several counts

and upon appeal or review some of them are held bad and the others are sustained, the sentence will not be disturbed, provided it is such as could lawfully have been imposed under the counts which are upheld. Evans *v.* United States, 153 U. S., 584; Claasen *v.* United States, 142 U. S., 140; Haynes *v.* United States, 101 Fed., 817 (C. C. A.); Jewett *v.* United States, 100 U. S., 832; Peters *v.* United States, 94 Fed., 127; 36 C. C. A., 105.

In this case what was confirmed by the President is suffi-
2122 cient under the law to justify the punishment inflicted. This disposes of all of the objections that merit consideration. The writ of *habeas corpus* will therefore be dismissed and the petitioner, Oberlin M. Carter, is remanded to the custody of the respondent.

THAYER, circuit judge: I concur in the foregoing opinion.

Endorsed: No. 7849. Oberlin M. Carter, on the petition of I. Stanton Carter, petitioner, *vs.* Robert W. McClaughrey, respondent. Opinion. Filed Dec. 10, 1900. Geo. F. Sharitt, clerk.

2123 UNITED STATES OF AMERICA, *District of Kansas*, } *ss*:

At a term of the circuit court of the United States of America for the district of Kansas, began and held at the city of Topeka, in said district, on Monday, the 26th day of November, A. D. 1900, proceedings were had and appear of record in words and figures as follows, to wit:

Present: Hon. William C. Hook, judge.

MONDAY, *December 10th*, 1900.

OBERLIN M. CARTER, on the Petition of I. STANTON CARTER, Petitioner, *vs.* ROBERT W. MCCLAUGHRY, Respondent. } 7849.

A writ of *habeas corpus* having been allowed herein on the 17th day of October, A. D. 1900, directed to Robert W. McClaughry, warden of the United States penitentiary at Fort Leavenworth, Kansas, commanding him to produce the body of said Oberlin M. Carter, before this court, and on November 23, 1900, return having been duly made and filed to said writ, and the said Oberlin M. Carter having been produced in compliance with said writ, said cause came on for hearing upon petitioner's oral motion to discharge the said Oberlin M. Carter, based upon the averments of respondent's return, no evidence having been offered or considered by the court. The petitioner appeared by the Honorable C. H. Grosvenor and Frank P. Blair, Esq., and the respondent appeared by J. W. Clous, deputy judge advocate general, and I. E. Lambert, United States district attorney. After hearing the arguments of counsel the court took the matter under advisement.

Now, on this 10th day of December, 1900, the court having fully

considered the matter and being advised in the premises, it is ordered by the court that the writ of *habeas corpus* herein be discharged; and it is further ordered that the said Oberlin M. Carter be remanded to the custody of Robert W. McClaughry, warden of the United States penitentiary at Fort Leavenworth, Kansas.

WILLIAM C. HOOK, *Judge.*

2124 In the Circuit Court of the United States for the District of Kansas.

OBERLIN M. CARTER, on the Petition of I. STANTON CARTER, Petitioner and Appellant,
vs.
ROBERT W. MCCLOUGHRY, Respondent and Appellee.

The above-named petitioner, conceiving himself aggrieved by the order and judgment entered on December tenth, A. D. 1900, in the above-entitled cause, doth hereby appeal from said order and judgment to the Supreme Court of the United States, and he prays that this his appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said order and judgment were made, duly authenticated, may be sent to the Supreme Court of the United States.

And the said petitioner presents herewith his assignment of errors, as required by rule 35 of the Supreme Court.

FRANK P. BLAIR,
Att'y for Petitioner and Appellant,
99 Randolph Str., Chicago, Illinois.

Dec. 10, 1900.

Appeal allowed as prayed for.
WILLIAM C. HOOK, *Judge.*

Endorsed: No. 7849. Oberlin M. Carter, on the petition of I. Stanton Carter, petitioner, *vs.* Robert W. McClaughrey. Petition for appeal. Filed Dec. 10, 1900. Geo. F. Sharitt, clerk.

2125 In the Circuit Court of the United States for the District of Kansas.

OBERLIN M. CARTER, on the Petition of I. STANTON CARTER, Petitioner & Appellant,
vs.
ROBERT W. MCCLOUGHREY, Respondent and Appellee.

Assignment of Errors.

Comes now I. Stanton Carter, the above-named petitioner, by Frank P. Blair, his attorney, and, in connection with his prayer for an appeal from the judgment of the said circuit court to the Supreme Court of the United States, says that in the record and proceedings in the above-entitled cause there is manifest error in this—that is to say:

I.

That the sentence imposed by the court-martial on which said Oberlin M. Carter is detained in the penitentiary at Fort Leavenworth, Kansas, is in violation of the fifth amendment to the Constitution of the United States in this, that by said sentence said Carter has been more than once put in jeopardy for the same offense.

II.

That said sentence of imprisonment is void because the said court-martial had no power to inflict the same under the 60th article of war.

III.

That said court-martial had no jurisdiction to sentence said Carter under the 62nd article of war.

IV.

That said sentence of imprisonment is void because the same is in excess of the limits fixed by the President of the United States, under the law, for the offenses with which said Carter was charged.

2126–2128

V.

That the entire sentence is void because the same differs from and exceeds that imposed by said court-martial.

VI.

That said sentence of imprisonment is void because the same was fixed by said court-martial to begin after said Carter had ceased to be subject to the rules and articles of war, and subject to the jurisdiction of said court-martial.

VII.

That said circuit court erred in not discharging said Carter upon the return to the writ herein.

Wherefore the said petitioner prays that the order and judgment of said circuit court be reversed, and said court be ordered to enter an order directing the said Oberlin M. Carter to be discharged from custody.

FRANK P. BLAIR,
Att'y for Petitioner and Appellant,
99 Randolph Street, Chicago, Ill.

Endorsed: No. 7849. Oberlin M. Carter, on the petition of I. Stanton Carter, petitioner, *vs.* Robert W. McClaughrey, respondent. Assignment of errors. Filed Dec. 10, 1900. Geo. F. Sharritt, clerk.

2129 In the Circuit Court of the United States for the District of Kansas.

OBERLIN M. CARTER, on the Petition of I. STANTON CARTER, Appellant,
vs.
ROBERT W. McCLAUGHRY, Appellee.

Motion.

Now comes the above-named appellant and moves the court for leave to file additional and amended assignment of errors as follows:

First. "That the sentence imposed by the court-martial on which said Oberlin M. Carter is detained in the penitentiary at Fort Leavenworth, Kansas, is in violation of the 102nd article of war in this, that by said sentence said Carter has been more than once put in jeopardy and punished for the same offense."

Second. "That the court-martial had no jurisdiction to try and impose sentence under charge four and the specifications supporting the same.

JNO. H. ATWOOD AND
W. W. HOOPER,
Attorneys for Petitioner and Appellant.

Endorsed: No. 7849. Motion to file amendment to assignment of errors. Filed Feb. 9, 1901. Geo. F. Sharitt, clerk.

2130 In the Circuit Court of the United States for the District of Kansas.

OBERLIN M. CARTER, on the Petition of I. STANTON CARTER, Appellant,
vs.
ROBERT W. McCLAUGHRY, Appellee.

Order.

Upon the application of the appellant and for good cause shown, leave is hereby given the appellant to file additional and amended assignments of error herein, as moved for in his motion heretofore filed herein.

Dated February 9th, 1901.

WILLIAM C. HOOK, *Judge.*

Endorsed: No. 7849. Order. Leave to applicant to file additional assignment of errors. Filed Feb. 11, 1901. Geo. F. Sharitt, clerk.

2131 In the Circuit Court of the United States for the District of Kansas.

OBERLIN M. CARTER, on the Petition of I. STANTON CARTER, Appellant,
vs.
ROBERT W. McCLAUGHRY, Appellee.

Additional Assignments of Error.

Now comes the appellant and, by leave of court first had and obtained, files the following as amendment to and additional assignment of errors herein:

First. That the sentence imposed by the court-martial on which said Carter is detained in the penitentiary at Fort Leavenworth, Kansas, is in violation of the 102nd articles of war in this, that by said sentence said Carter has been more than once put in jeopardy and punished for the same offense.

Second. That the court-martial had no jurisdiction to try and impose sentence under charge four and the specifications supporting the same.

FRANK P. BLAIR,
JEREMIAH WILSON,
JNO. H. ATWOOD, AND
W. W. HOOPER,
Attorneys for Petition- and Appellant.

Endorsed: No. 7849. Additional assignment of errors. Filed Feb. 11, 1901. Geo. F. Sharitt, clerk.

2132 UNITED STATES OF AMERICA, *District of Kansas,* } *ss:*

I, Geo. F. Sharitt, clerk of the circuit court of the United States of America for the district of Kansas, do hereby certify the foregoing to be a true, full, and correct copy of the record and proceedings in said court in a case wherein Oberlin M. Carter, on the petition of I. Stanton Carter, is petitioner and Robert W. McClaughry is respondent, being No. 7849 in said court.

I further certify that the original citation is hereto attached and returned herewith.

The Seal of the Circuit Court of the United States, District of Kansas, 1862.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Topeka, in said district of Kansas, this 9th day of February A. D. 1901.

GEO. F. SHARITT, *Clerk.*

{ Ten-cent United States internal-revenue stamp, canceled Feb. 9, '01. G. F. S. }

2133 567. 18052.

In the Supreme Court of the United States, October Term, 1900.

I. STANTON CARTER (on Behalf of OBERLIN M. CARTER), Appellant,
v.
ROBERT W. MCCLAUGHRY, Warden of the United States Penitentiary at Fort Leavenworth, Kansas. } No. 567.

Comes now the above-named appellant, by his attorney, and, in pursuance of the rules of practice of this court in such case made and provided, hereby designates the following parts of the record on file herein as parts thereof to be printed and which he thinks necessary for the consideration of said cause:

Original citation and acknowledgement of service	p.	1
Application for writ of *habeas corpus*	pp.	2–37
Order for issuance of writ of *habeas corpus*	p.	38
Amendment to petition	pp.	40, 41
Indictment in the case of United States *v.* Green *et al.*, U. S. district court, eastern division, southern district, Georgia	pp.	42–61
Return of Robert W. McClaughry	pp.	62–65
Exhibit A to said return (being general orders No. 172, War Department)	pp.	1412–1447
Exhibit ½ A to said return	p.	1449
Marshal's return to writ of *habeas corpus*	p.	2113
Opinion of the court	pp.	2114–2122
Order remanding petitioner		2123
Petition for appeal and allowance thereof	p.	2124
Assignment of errors	pp.	2125, 2126
Appellant's motion for leave to file additional assignments of error	p.	2129
Order granting such leave	p.	2130
Additional assignments of error	p.	2131
Clerk's certificate	p.	2132

The appellant further hereby designates the following as the parts of the record to be omitted in printing:

Stipulation that body of petitioner need not be produced at hearing	p.	39
2134 Exhibit A to petition for writ of *habeas corpus*	pp.	66–1411

The following exhibits to the return of respondent:

B	pp.	1450–1487
C	pp.	1488–1497
D	pp.	1498–1511
E	pp.	1512–1515
F	pp.	1516–1595
G	pp.	1596–1659

H..... pp. 1660–1727
I..... pp. 1728–1739
J..... pp. 1740–1827
K..... pp. 1828–2006
L..... pp. 2007–2106
M..... pp. 2107–2112
Bond on appeal to Supreme Court of the United States..... p. 2127

The appellant further hereby designates (without again repeating the same at length herein) as the assignments of error upon which he intends to rely at the hearing in this case the assignments of error and the additional assignments of error above referred to and herein designated to be printed.

I. STANTON CARTER,
By J. M. WILSON, *Attorney.*

Service of a copy of above notice acknowledged.
JOHN K. RICHARDS,
Solicitor General.

H.

February 23, 1901.

[Endorsed:] 567. 18052. Feb. 23, 1901.
2135 [Endorsed:] File No., 18052. Supreme Court U. S., October Term, 1900. Term No., 567. I. Stanton Carter (on behalf of Oberlin M. Carter), app't, *vs.* R. W. McClaughry, warden, &c. Designation by appellant of parts of record to be printed. Office Supreme Court U. S. Filed Feb. 23, 1901. James H. McKenney, clerk.

2136 In the Supreme Court of the United States, October Term, 1900.

I. STANTON CARTER (on Behalf of OBERLIN M. CARTER), Appellant,
vs.
ROBERT W. MCCLAUGHRY, Warden of the United States Penitentiary at Fort Leavenworth, Kansas. } No. 567.

In the above-entitled cause, in addition to the parts of the record which the counsel for the appellant has designated under rule 10, section 9, he desires to have printed, the Government desires that the following shall be printed:

Part of Exhibit A to return..... p. 1448
Exhibit J, transcript of record in the Supreme Court of the U. S. from the circuit court of appeals, Carter *vs.* Roberts..... pp. 1740 to 1826
(With the exception of general orders No. 172, War Department, on pages 1754 to 1796.)
Assignment of errors..... pp. 2051, 2052

J. K. RICHARDS,
Solicitor General.

[Endorsed:] 567. 18052. Mar. 18, 1901. Designation by appellee under sec. 9, rule 10.

2137 [Endorsed:] File No., 18052. Supreme Court U. S., October term, 1900. Term No., 567. I. Stanton Carter (on behalf of O. M. Carter), app't, *vs.* R. W. McCaughry, warden, &c. Designation by appellee of additional parts of record to be printed. Filed Mar. 18, 1901.

2138 In the Supreme Court of the United States, October Term, 1900.

I. STANTON CARTER (on Behalf of OBERLIN M. CARTER), Appellant,
vs.
ROBERT W. MCCLAUGHRY, Warden of the United States Penitentiary at Fort Leavenworth, Kansas. } No. 567.

Stipulation.

It is hereby stipulated by counsel for the parties to the above-entitled cause that the portions of the record omitted in accordance with rule 10, section 9, may be referred to by counsel and the court, and such papers or any portion thereof as may be desired by the court in the consideration of this case shall be printed by the appellant.

JEREMIAH M. WILSON,
Counsel for the Appellant.
J. K. RICHARDS,
Solicitor General, for the Appellee.

[Endorsed:] 567. 18052. Mar. 18, 1901. Stipulation of counsel as to portions of record omitted under sec. 9, rule 10.

2139 [Endorsed:] File No., 18052. Supreme Court U. S., October term, 1900. Term No., 567. I. Stanton Carter (on behalf of O. M. Carter), app't. *vs.* R. W. McCaughry, warden, &c. Stipulation of counsel as to portions of record omitted under section 9, rule 10. Filed Mar. 18, 1901.

Endorsed on cover. File No., 18052. Kansas C. C. U. S. Term No., 567. I. Stanton Carter (on behalf of Oberlin M. Carter), appellant, *vs.* Robert W. McClaughry, warden of the United States penitentiary at Fort Leavenworth, Kansas. Filed February 14th, 1901.

No. 251.
Motion to advance

Office Supreme Court U.S.
FILED
OCT 26 1901
JAMES H. McKENNEY,
Clerk.

Filed Oct 26, 1901.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 251.

I. STANTON CARTER (ON BEHALF OF OBERLIN M. CARTER), APPELLANT,

vs.

ROBERT W. McCLAUGHRY, WARDEN, ETC., APPELLEE.

Appeal from United States Circuit Court, District of Kansas.

MOTION TO ADVANCE CAUSE.

FRANK P. BLAIR,
Attorney for Appellant.

LAW REPORTER PRINT.

IN THE

Supreme Court of the United States.

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I. STANTON CARTER (ON BEHALF OF OBERLIN M. CARTER), APPELLANT,

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Appeal from United States Circuit Court, District of Kansas.

Comes now the appellant in the above entitled cause, by Frank P. Blair, his attorney, and respectfully moves this Honorable Court to advance the hearing thereof and set the same down for an early hearing at the present term of court; and for grounds of said motion assigns the following:

The said Oberlin M. Carter was tried by a general court-martial at Savannah, Georgia, from the 12th day of January to the 28th day of April, A. D. 1898, and was by said court-martial convicted of sundry charges and specifications, and sentenced to a term of imprisonment for five years, to be fined in the sum of five thousand dollars, and to be dismissed the Army of the United States, all of which appears at large in the record of this case. Thereafter, on the 29th day of September, 1899, the President of the United States having approved the sentence of said court-martial, the said Oberlin M. Carter was taken into custody and has since

that time remained in the custody of the United States, and is now confined at the United States prison at Fort Leavenworth, Kansas, undergoing said sentence.

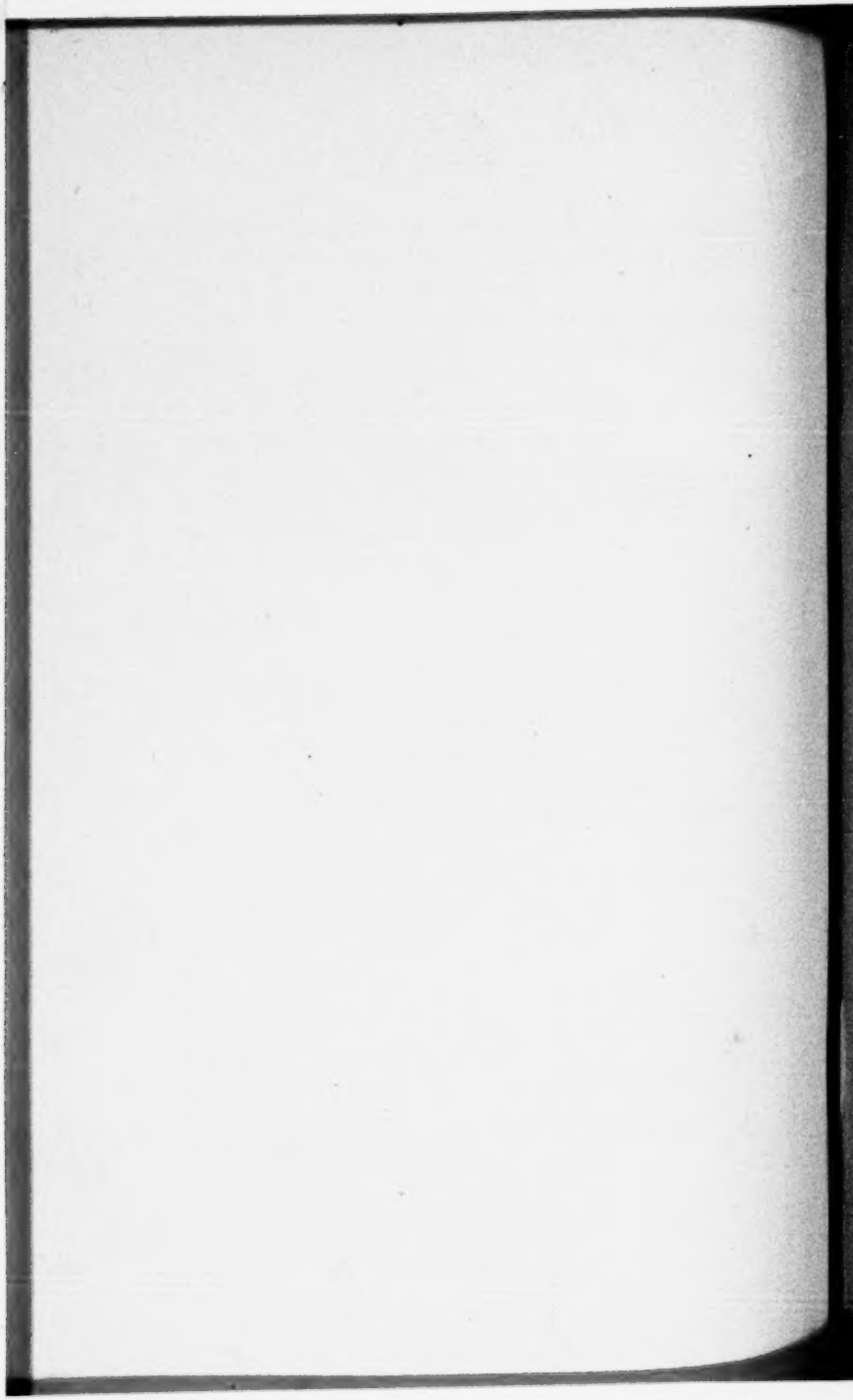
That afterwards an application for a writ of *habeas corpus* was made at the city of Leavenworth, in the Circuit Court of the United States then and there sitting, before Judge Amos M. Thayer, Circuit Judge, and Judge Hook, District Judge, which application was granted by said court; but afterwards on hearing on November 10, 1900, the said Carter was remanded to the custody of the warden of said prison where he has remained from thence hitherto.

That afterwards appellant prosecuted this appeal to this court where said case is now pending.

This application to advance the cause is in favor of the liberty of a citizen, and it is respectfully urged that the same be granted and the case set down for as early a hearing as may suit the convenience of the court.

All of which is respectfully submitted.

FRANK P. BLAIR,
Attorney for Appellant.



No. 251.

By. of Blair & Wilson for Appt

FILED
MAR 15 1901
JAMES H. McKENNEY,
Clerk.

Filed Mar. 15, 1901.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

OBERLIN M. CARTER, on the Petition of I. Stanton Carter,
Petitioner,
vs.
ROBERT W. McCLAUGHRY.

Appeal from the United States Circuit Court for the District of Kansas.

BRIEF ON BEHALF OF APPELLANT.

FRANK P. BLAIR,
ATTORNEY FOR PETITIONER.

JERE M. WILSON,
OF COUNSEL.

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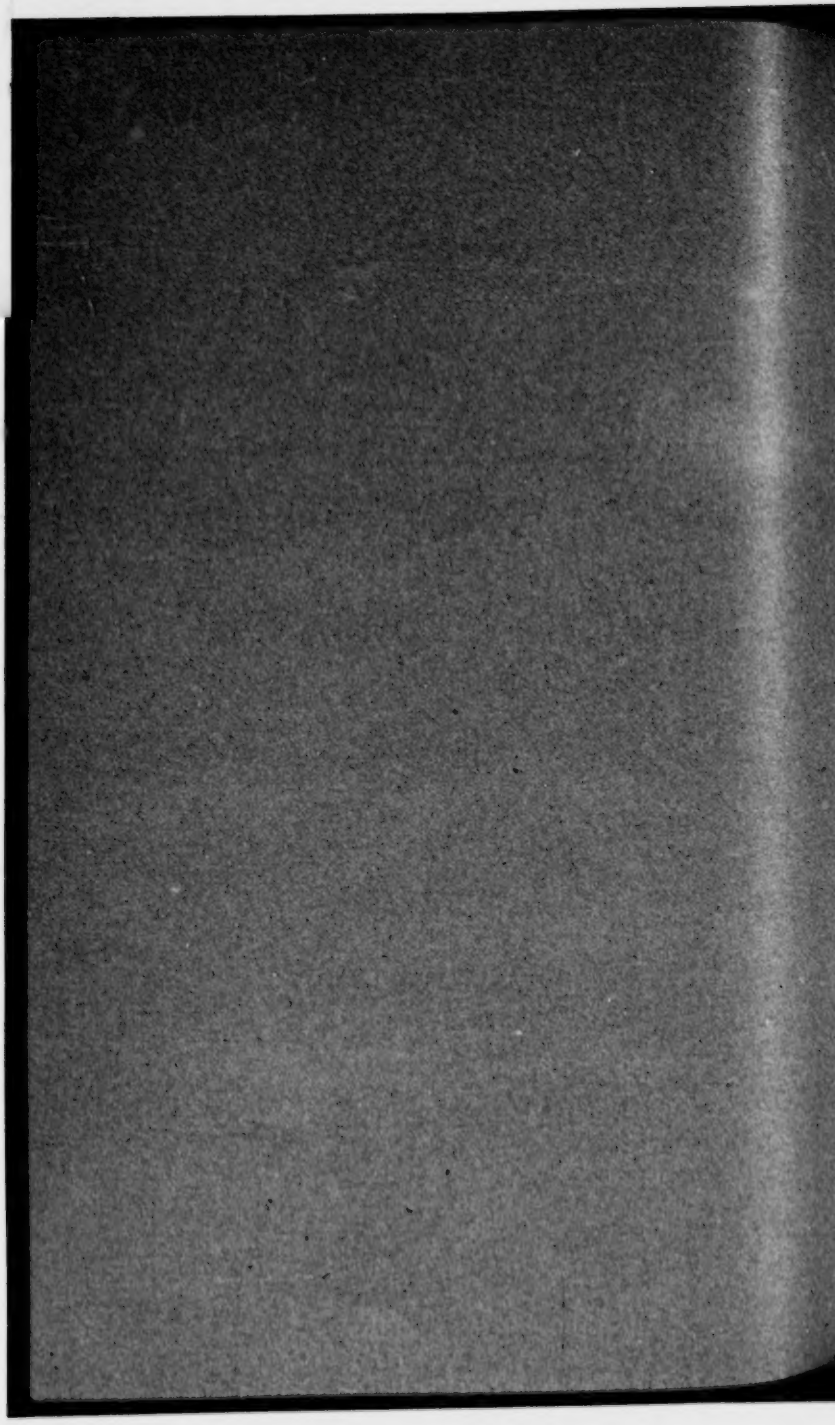

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D 1900.

OBERLIN M. CARTER, on the Petition of I. Stanton Carter, *Petitioner*,

vs.

ROBERT W. McCLAUGHRY.

Appeal from the United States Circuit Court for the District of Kansas.

STATEMENT.

This was a petition for the writ of *habeas corpus* addressed to the United States Circuit Court for the District of Kansas, in behalf of Oberlin M. Carter, late Captain U. S. Corps of Engineers, alleged to be unlawfully confined in the United States penitentiary at Fort Leavenworth, Kansas.

The petition sets out the fact of imprisonment of said Carter, under a sentence of a general court-martial (which sentence was that said Carter be cashiered the army, with publication of his offense; that he be fined $5,000; and that he be imprisoned at hard labor in the

penitentiary for a term of five years) and the approval by the President of such sentence.

The petition then copies in *hæc verba* the mittimus as embraced in General Orders No. 172, Headquarters of the Army, A. G. O., September 29, 1899.

These orders set forth the thirty-seven specifications, grouped under four charges, upon which Capt. Carter was arraigned before said court-martial; his plea of limitation to seventeen of such specifications, sustained by the court; his plea of "not guilty" as to the remaining twenty; his acquittal by the court of four, and conviction by it of the remaining sixteen specifications, arranged under the four charges; the sentence as above mentioned; the order of the President disapproving the findings of the court-martial as to twelve of the sixteen specifications; the approval of the remaining four, one under each charge; the approval of the sentence as imposed by the court-martial.

The petition then avers that Capt. Carter has been ordered dismissed from the army; that his offense has been published in certain newspapers; that he has paid the fine of $5,000 imposed by the court-martial; and that he is now undergoing imprisonment.

It is then alleged that said imprisonment is illegal and void for the following reasons:

First: There was no evidence whatever adduced before the court-martial tending to show that Carter was guilty of any offense.

Second: The finding of guilty by said court on the specification under charge IV is void, because:

(A) The specification and the evidence adduced before the court-martial show that the money alleged to

have been misapplied within the meaning of Sec. 5,488, R. S. U. S., was not so misapplied, but was, on the contrary, paid out for a purpose authorized by law.

(B) An inspection of the specification under said charge IV discloses that the offense charged by said specification was not justiciable under said charge, but if any offense is thereby charged it is a violation of the 60th article of war.

Third: The imprisonment of said Carter is void, because in violation of the fifth amendment to the constitution of the United States.

(*a*) It appears from an inspection of the charges and specifications and from the evidence before the court-martial that the basis of each charge and specification is a single act—viz., the drawing and delivering of the same two checks, and that the same act has been split up into four several distinct offenses and a punishment imposed for each offense.

(*b*) Under article of war 60 the court-martial has jurisdiction to inflict as punishment a fine *or* imprisonment, *or* some other punishment, in the alternative, and not cumulatively; and hence the imprisonment under the allegations is in excess of the court's powers, and void.

(*c*) Under article 61 the court had jurisdiction to cashier only.

(*d*) The facts set out in the specifications show that the offense committed, if any, was punishable under the 60th and not under the 62d article of war, which latter provides for the alternative punishment above mentioned.

The conclusion drawn from the foregoing under (B) is that petitioner has necessarily been twice punished for

the same offense, this being in violation of the constitutional inhibition.

Fourth: The sentence of imprisonment is void because inflicted after said Carter had ceased to be amenable to military jurisdiction.

Fifth: The sentence of imprisonment is void because under the presidential order of March 20, 1895, and the army regulation of October 31, 1895, the court-martial could not imprison the defendant to exceed four years.

Sixth: The entire sentence is void, because the court-martial having convicted the defendant of sixteen specifications, alleging nine different and distinct offenses, and the President having disapproved the findings of guilty as to twelve thereof, charging eight different offenses, and having approved the findings as to only four, charging a single offense, the sentence, as approved, was no longer the sentence of the court-martial, but became a greater and more onerous punishment than was imposed by the court for the specifications approved.

In an amendment to the petition the fact of the indictment of Capt. Carter with Greene and others for the same acts as set out in the charges and specifications here under consideration is alleged, which indictment was found subsequent to the first application for a writ of *habeas corpus* by Capt. Carter, hereinbelow referred to.

The petition concludes by setting out the proceedings very briefly of a previous application by said Carter in the Southern District of New York and the action thereon by the Circuit Court of Appeals and this court on said application.

The writ prayed for in the present case was issued by the Circuit Court for the District of Kansas, and a return was duly made thereto.

The return admits the detention of said Oberlin M. Carter by respondent; avers that he is held by virtue of a sentence of a general court-martial, as shown by general orders 172, hereinabove referred to; and attaches said order as an exhibit. The order is the same as set out in full in the petition herein.

The return proceeds to state at length the proceedings in the former application for the writ of *habeas corpus* (being the same proceedings alleged in the petition), and avers the issuance of the mandate of this court in said former proceedings remanding said Carter.

The remainder of the return consists of certain averments of legal conclusions not necessary here to specify.

To this return petitioner demurred, and, on hearing, the Circuit Court remanded the prisoner.

Under the pleadings the following matters were admitted:

The charges and specifications under which Carter was tried by a court-martial convened in January, 1898, at Savannah, Georgia.

The various pleas of said Carter thereto.

The findings of the court-martial on said pleas.

The sentence of the court-martial.

The determination of the President of the United States on said findings and sentence.

The payment by said Carter of the fine of $5,000 adjudged by said court-martial.

The order of the President dismissing said Carter from the army of the United States, and the publication of his offense in certain newspapers, in accordance with 101 Art. of War; hereinafter called his "degradation."

The confinement of said Carter in the penitentiary as alleged in the petition.

The application of said Carter for the writ of *habaes corpus* on October 2, 1899, to the United States Circuit Court for the Southern District of New York, his remand to the custody of the military authorities; the subsequent appeal to the United States Circuit Court of Appeals of the Second Circuit; the affirmance of the holding of the lower court; the petition to this court for *certiorari* and its denial; the appeal to this court from the order of the Circuit Court and its dismissal.

That there was no evidence adduced before the court-martial tending to show any guilt on the part of said Carter.

That the evidence before the court-martial showed that the moneys paid out by Carter as alleged in the specification to charge IV were paid by him "under and in accordance with the specifications of two certain contracts "between the United States of America and the Atlantic "Contracting Company, dated September 8, A. D. 1896, "for the improvement of Savannah Harbor and Cumberland Sound, respectively, which said contracts were entered into pursuant to the act of Congress approved "June 3, 1896."

That under the act of Congress approved September 27, 1890, the President, by an order dated March 20, 1895, fixed the maximum punishment for a violation by an enlisted man of the United States army of the 60th article of war, and also for a violation by such person of the 62d article by embezzlement of more than $100, at a term of four years confinement at hard labor, under each article.

That the President also promulgated on October 31, 1895, certain army regulations, and among them, "Art. 938. Whenever, by any of the articles of war, "punishment is left to the discretion of the court, it "shall not, in time of peace, be in excess of a limit "which the president may prescribe The limits so "prescribed are set forth in the manual for courts-mar- "tial, published by authority of the secretary of war."

That the limits above mentioned are the limits prescribed in said Manual, and that article 938 above set out was in force when said court-martial passed sentence on said Carter.

That since the first application for the writ of *habeas corpus* in behalf of said Carter was made, said Carter, with Greene and others, was indicted by the Federal grand jury at Savannah, Georgia, for conspiracy, based on substantially the same facts set out in specification 2 under charge I; and that the exhibit to the amendment to the petition herein is a true copy of such indictment.

The charges and specifications on which it was finally determined by the president that appellant was guilty, are as follows:

Charge I. Conspiracy to defraud the United States, in violation of the 60th article of war.

Specification 2. "In that Captain Oberlin M. Carter, "Corps of Engineers, United States Army, devising and "intending to defraud the United States and to aid the "Atlantic Contracting Company, a corporation, and John "F. Gaynor, William T. Gaynor, and Edward H. Gay- "nor, and Anson M. Bangs, and divers other persons, "all of whom were likewise with him, the said Carter, "devising and intending to defraud the United States,

"did, with the corporation and persons named, unlaw-
"fully combine and conspire to defraud the United
"States of divers large sums of money by aiding
"the said the Atlantic Contracting Company, to ob-
"tain the allowance and payment of certain false
"and fraudulent claims hereinafter described; and in
"pursuance of the said conspiracy the said Oberlin
"M. Carter, in the months of June, July and August,
"September and October, 1896, being an officer of the
"United States in local charge of the river and harbor
"district usually called the Savannah District, and of
"the improvement by the United States of rivers and
"harbors in said district, did, with the knowledge and con-
"sent of the said other parties named, so advertise for
"proposals for contracts for certain works of improve-
"ment in the harbor of Savannah, Georgia, in said dis-
"trict, and so manage and conduct said advertising and
"the matter of giving out information in regard to the
"contract to be let, and the matter of receiving proposals
"and awarding the contract as to enable the said the At-
"lantic Contracting Company to secure the contract for
"said work, and to have the same entered into by the
"United States with it October 8, 1896; and in further
"pursuance of the said conspiracy the said the Atlantic
"Contracting Company, afterwards, to-wit, from about
"the 8th day of October, 1896, to July 31, 1897, did fur-
"nish and put into sa d work certain mattresses, stone and
"other material which were different in kind and character
"from the mattresses, stone and other material contracted
"for in said contract, and very much less costly to the said
"the American Contracting Company, as well as of less
"value to the United States; which said mattresses, stone
"and other material so furnished and put into the work

"the said Capt. Carter, in further pursuance of said con-
"spiracy, did receive and accept, and cause to be received
"and accepted, for the United States, as and for the mat-
"tresses, stone and other material contracted for; and did,
"on or about July 6, 1897, cause to be paid out of the
"moneys of the United States, $230,749.90 to the said
"the Atlantic Contracting Company, on account of the
"said furnishing and delivery of the same, and as if the
"said mattresses, stone and other material had been such
"as were stipulated for in the contract, and at the same
"rate, cost and price as if they had been.

"And in further pursuance of the said conspiracy the
"said Capt. Carter, about June, July, August, September
"and October, 1896, did advertise for proposals for a con-
"tract for improving Cumberland Sound, Georgia, in said
"river and harbor district, and so manage and conduct the
"matter of such advertising, and the matter of giving out
"information in regard to the contract to be let, and the
"matter of receiving proposals and awarding the contract,
"as to enable the said the Atlantic Contracting Company
"to secure the contract for said work, and to have the
"same entered into by the United States with it October 8,
"1896; and in further pursuance of the said conspiracy,
"the said the Atlantic Contracting Company from
"about the 8th day of October, 1896, to the 31st day of
"July, 1897, did furnish and put into said work certain
"mattresses, stone and other material which were differ-
"ent in kind and character from the mattresses, stone
"and other material contracted for in said contract, and
"very much less costly to the said the Atlantic Con-
"tracting Company, as well as of less value to the United
"States; which said mattresses, stone and other material
"so furnished and put into the work the said Captain

"Carter, in further pursuance of said conspiracy, did re-
"ceive and accept, and cause to be received and ac-
"cepted, for the United States, as and for the mattresses,
"stone, and other material contracted for; and did, on
"or about July 6, 1897, cause to be paid, out of the
"moneys of the United States, $345,000 to the said
"Atlantic Contracting Company, on account of said
"furnishing and delivery of the same, and as if the said
"mattresses, stone and other material had been such as
"were stipulated for in the contract and at the same
"rate, cost, and price as if they had been.

"This on the 6th day of June, 1896, and thereafter
"to the 1st day of August, 1887."

Charge II. "Causing false and fraudulent claims to
"be made against the United States, in violation of the
"60th article of war.

Specification 4. "In that Captain Oberlin M. Car-
"ter, Corps of Engineers, United States Army, being
"at the time the officer in local charge of river and har-
"bor improvements in the Savannah river and harbor
"district, did cause to be made certain false and fraud-
"ulent claims against the United States and in favor of
"the Atlantic Contracting Company, a corporation,
"knowing the same to be false and fraudulent, to wit:
"The claim represented by the following voucher, sub-
"mitted by the said Captain Carter with his accounts
"and marked, 'Appropriation for improving harbor at
"'Savannah, Georgia':

"Voucher No. 8, $230,749.90, July, 1897;
"and the claim represented by the following voucher
"submitted by the said Captain Carter, with his accounts,
"and marked 'Appropriation for improving Cumber
"'land Sound, Georgia and Florida':

"Voucher No. 9, $345,000, July, 1897;
" which said false and fraudulent claims the said Captain
" Carter caused to be made by knowingly permitting the
" said Atlantic Contracting Company, which had previ-
" ously entered into contracts, dated October 8, 1896, to
" furnish the United States certain mattresses, stone and
" other material, of specified kinds and qualities, for
" constructing works in said river and harbor districts,
" to furnish and put into said works mattresses, stone
" and other material different from, inferior to, cheaper
" and of less value to the United States than those con-
" tracted for; and by receiving and accepting and paying
" for the same as of the kinds and qualities contracted
" for, and by falsely certifying to the correctness of the
" said vouchers, well knowing that the mattresses, stone
" and other material charged for in said vouchers as hav-
" ing been furnished, had not, in fact, been furnished;
" each of the said claims having been made in or about
" the month named in the above description of the
" voucher relating to it."

Charge III. "Conduct unbecoming an officer and a
" gentleman, in violation of the 61st article of war."

Specification 2. "In that Captain Oberlin M. Carter,
" Corps of Engineers, United States Army, being the
" officer in local charge for the United States of river
" and harbor improvements in the Savannah river and
" harbor district, did wilfully and knowingly cause the
" following amounts to be paid out of the moneys of the
" United States, subject to his order and control as officer
" in charge of said improvements to the Atlantic Con-
" tracting Company, a corporation; the accounts on
" which the same were paid being false, and the amounts
" paid not being due or owing from the United States to

"the said company or to any one, and he, the said Cap-
"tain Carter, well knowing this to be the case; the said
"accounts and amounts paid and the payments being
"those designated by the following voucher (and the
"entries therein and endorsements thereon), submitted
"by the said Captain Carter with his accounts and
"marked 'Appropriation for improving harbor of Sa-
"vannah, Ga.':

"Voucher No. 8, $230,749.90, July, 1897;
"and the one indicated and designated by the following
"voucher (and the entries and endorsements thereon),
"submitted by the said Captain Carter and his accounts
"and marked 'Appropriation for improving Cumber-
"land Sound, Georgia and Florida':

"Voucher No. 9, $345,000, July, 1897;
"each of the said payments having been caused to be made
"on or about July 6, 1897, by the said Captain Carter
"drawing and delivering a check as such officer in charge
"of river and harbor improvements, by which the pay-
"ment was ordered and directed to be made out of the
"moneys of the United States under his control as such
"officer."

Charge IV. "Embezzlement, as defined in section
"5488, Revised Statutes of the United States, in viola-
"tion of the 62d article of war."

Specification 1. "In that Captain Oberlin M. Carter,
"Corps of Engineers, United States Army, being the
"officer in charge for the United States of river and harbor
"improvements in the Savannah river and harbor dis-
"trict, and, as such officer in charge of said improve-
"ments, being a disbursing officer of the United States,
"and having entrusted to him large amounts of public
"money of the United States, did wilfully and know-

"ingly apply, for a purpose not authorized by law, large "sums of the said moneys so entrusted to him, by wil- "fully and knowingly causing the amounts hereinafter "named to be *paid out of the said* moneys which were "subject to his order and control of such officer in charge "of said improvements; the accounts on which the same "were being paid being false, the amounts paid not be- "ing due or owing from the United States to the parties "paid, or to any one, and he, the said Captain Carter, "well knowing this to be the case; the said accounts, the "amounts paid, and the payments being those desig- "nated by the following voucher (and the entries therein "and the endorsement thereon) submitted by the said "Captain Carter with his accounts and marked 'Appro- "priation for improving harbor at Savannah, Georgia':

"Voucher No. 8 ($230,749.90), July, 1897;

"and the one indicated and designated by the following "voucher (and the entries therein and endorsements "thereon), submitted by the said Captain Carter with "his accounts and marked 'Appropriation for improving "Cumberland Sound, Georgia, and Florida':

"Voucher No. 9 ($345,000), July, 1897;

"each of the said payments having been caused to be "made on or about July 6, 1897, by the said Captain "Carter drawing and delivering a check as such officer "in charge of river and harbor improvements, by which "the payment was ordered and directed to be made out "of the moneys of the United States under his control "as such officer."

To recapitulate, condensing, the said charges and specifications allege:

Charge I. Conspiracy in violation of the 60th article of war.

Specification 2. That the accused, being a disbursing officer, did unlawfully conspire, with others named, to obtain the allowance and payment of certain false and fraudulent claims against the United States, by doing, among other things, the following: Accepting materials inferior to those prescribed by the specifications of two contracts, dated October 8, 1896, and by causing to be paid by the United States the sums of $230,749.90 and $345,000 on account of such inferior material.

Charge II. Causing false and fraudulent claims to be paid in violation of the 60th article of war.

Specification 6. That the accused, being a disbursing officer, did knowingly accept materials inferior to those prescribed by contract and did cause false and fraudulent claims to be paid for the sums of $230,749.90 and $345,000.

Charge III. Conduct unbecoming an officer and gentleman, in violation of the 61st article of war.

Specification 2. That the accused, being a disbursing officer, did, knowingly, on certain false accounts, the money not being due or owing thereon, cause to be paid by the United States, $230,749.90 and $345,000.

Charge IV. Embezzlement as defined by 5488 R. S. U. S., in violation of the 62d article of war.

Specification 1. That the accused, being a disbursing officer, did knowingly on false accounts, the money not being due or owing thereon, cause to be applied to a purpose not "authorized by law" $230,749.90 and $345,000, money of the United States.

SPECIFICATION OF ERRORS.

1.

THE FINDING OF "GUILTY" UNDER CHARGE IV AND ITS SPECIFICATION WAS BEYOND THE POWERS OF THE COURT-MARTIAL, AND ILLEGAL AND VOID, BECAUSE:

(A) THE SPECIFICATION WAS WRONGLY LAID UNDER ARTICLE 62, BECAUSE:

(a) *The money was applied to a purpose prescribed by law.*

(b) *The crime charged was not "to the prejudice of "good order and military discipline."*

(B) THE CRIME CHARGED WAS "MENTIONED IN THE "FOREGOING ARTICLES OF WAR."

(a) *It was covered by par. 1 and par. 4 of Article 60.*

(b) *It was covered by par. 9 of Article 60 because it was embezzlement of money "furnished or intended for "the military service." This last is shown:*

(1) By the course of legislation on the subject.

(2) By the fact that the right of Congress to so spend the people's money is derived largely from the war powers.

(3) By the organization of the Corps of Engineers.

(4) By the letter and spirit of Article 60.

II.

IF THE FINDING UNDER ARTICLE 62 IS VOID, THEN THE SENTENCE IS IN VIOLATION OF THE FIFTH AMENDMENT OF THE CONSTITUTION, BECAUSE:

(a) *The sentence is greater than can be imposed for any alleged crime taken singly*, and

(b) *There are only two separate crimes charged, viz., conspiracy and paying fraudulent claims; while there are three several penalties imposed, viz., dismissal, fine and imprisonment. Two have been discharged, viz., dismissal and fine; and hence the third, imprisonment, is illegal.*

III.

THE ENTIRE SENTENCE IS ILLEGAL AND VOID BECAUSE THE PRESIDENT HAVING DISAPPROVED THE CONVICTION AS TO CERTAIN OFFENSES, AND HAVING ORDERED THE ORIGINAL SENTENCE TO STAND, SUCH SENTENCE CEASED TO BE THE SENTENCE OF THE COURT-MARTIAL.

IV.

THE IMPRISONMENT IS ILLEGAL BECAUSE INFLICTED AFTER PETITIONER CEASED TO BE AN OFFICER OF THE ARMY.

V.

THE SENTENCE OF IMPRISONMENT IS VOID BECAUSE IN EXCESS OF THE MAXIMUM ALLOWED BY LAW.

VI.

THE COURT-MARTIAL HAD NO JURISDICTION TO TRY PETITIONER, BECAUSE IT STANDS ADMITTED THAT NO EVIDENCE WHATEVER WAS ADDUCED TENDING TO SHOW HIS GUILT.

BRIEF AND ARGUMENT.

Before elaborating the various assignments of error it is deemed not inappropriate to recall to the mind of the Court certain matters relating to the organization, powers and procedure of courts-martial under our law.

They are "inferior courts of limited jurisdiction, "whose judgments may be questioned collaterally."

Exparte Watkins, 3 Pet., 193, 207.
Runkle v. *United States*, 122 U. S., 543.

They are constituted of a certain number of members, officers of the army, who are judges of both law and fact, and of a judge advocate, who is the legal adviser of the court, and in theory, at least, represents both the prosecution and the accused. In making up its findings, it is the duty of the court to find specifically as to the guilt or innocence of the defendant, separately as to each charge and specification: and the custom is for the court to fix a lumping punishment for all the charges and specifications of which the accused has been found guilty. Neither the findings nor the sentence possesses any validity whatever until the same shall have been passed upon and approved or disapproved, by the proper reviewing authority, and his conclusions promulgated by order duly issued. Such reviewing authority may approve or disapprove any or all of the proceedings or findings, and may confirm in whole or in part the sentence imposed, or may wholly disapprove the same. He may mitigate, or may commute the sentence, in whole or in part, but he may not change the nature of the punishment; neither can he increase it in any respect whatso-

ever. In the event the President is the reviewing authority he may, of course, exercise his prerogative of pardon.

1 Winthrop Mil. Law, pp. 570, 614, 683, 685 *et seq.* (2d Ed.), and authorities therein cited, *passim.*

The adjective and substantive law governing these Courts is derived from three different sources:

First. The positive statutory enactments by Congress, made under the authority of the constitution of the United States, commonly known as the Articles of War.

Second. The army regulations, which are promulgated by the secretary of war, under and by the authority of the president.

Third. The unwritten military law. It is from this last source that the adjective law is for the most part derived; and it consists of the custom of war and the usages or customs of the service. It is expressly recognized in the 84th article of war as a binding body of law upon courts-martial.

It is also recognized by the Supreme Court of the United States in the case of *Martin* v. *Mott*, 12 Wheat., 19. The opinion in the case was delivered by Mr. Justice Story. On page 35 the following language occurs: "If, then, there be no mode pointed out for the forma-"tion of the court-martial in these cases, it may be asked "in what manner is such a court to be appointed? The "answer is, according to the general usage of the military "service, or what might be not unfitly called the cus-"tomary military law. It is by the same law that courts-"martial, when duly organized, are bound to execute

"their duty and regulate their modes of proceeding, in "the absence of positive enactments. Upon any other "principle courts-martial would be left without any ad- "equate means to exercise the authority confided to them; "for there could scarcely be formed a positive code to "provide for the infinite variety of incidents applicable "to them."

This unwritten military law is to be found chiefly in the approved text books on the subject of military law or courts-martial; and it is sometimes preserved in the memory of older officers of the service.

If, then, any point is substantially agreed on by the approved text writers, it may be safely concluded that such is the unwritten or customary law. It is, perhaps, unnecessary to state that when the evidence of such custom is found in the manner indicated, and the custom is not obnoxious to any of the existing written military law, then, so far as that custom is applicable to the case in hand, it has all the binding force of a statutory enactment.

The indictment before such a body is called generically the "charge." This charge consists of two parts: *First*, the charge (used in its narrower sense), and, *second*, the specification. The first sets forth the offense in general terms, usually the mere statement: "Violation of the —— Article of War." The specification sets forth the facts constituting the particular offense.

Manual for Courts Martial, p. 15.

The charge proper is simply the pleader's notion of the legal effect of the facts alleged in the specification, and is a mere conclusion of law. Thus, if a specification be laid under an article of war defining a specific

offense, the court-martial, if the proof fails to make out the offense named, may, and should, find the accused not guilty of the particular charge, but guilty of violating some other article of war defining a lesser degree of the same crime, or guilty under the general article; that is to say, under the 62nd. For example, if the charge be desertion, in violation of the 47th article, the court may find the accused not guilty of that charge but guilty of absence without leave in violation of Article 32; or, if the charge be suffering military stores to be damaged in violation of Article 15, and the court find the damage was not *wilfully* suffered, it may, if the proof justify it, find the officer not guilty under that Article, but guilty of conduct to the prejudice of good order and military discipline in violation of Article 62.

Manual, p. 48.*

It is the custom of the service, in preparing charges, to group all specifications describing the same class of offenses under one charge, instead of repeating the charge with each specification; as for example, the twenty-three specifications under charge 3 in the proceedings against Capt. Carter. This is merely to avoid useless repetition, but the charge must be taken separately in connection with each specification, for no charge (in its broad sense) is complete unless the specification be laid under a charge (in its narrower sense). The elision of the charge where there are two or more specifications is on the same principle that authorizes a pleader to refer to a former count in an indictment for matter elaborated in such count, and

*It should be noted that the "Manual for Courts-Martial," cited *passim* in this brief, has the force of law, for it is promulgated by the Secretary of War under his general powers to provide rules for the government of the army.

thus save the labor of repeating lengthy allegations in each of several subsequent counts.

It was well stated by counsel for respondent below in his brief: "A specification cannot be separated from the "charge. The two must be considered together."

"However inartificial a pleading may be," says the Digest, "it will probably be held sufficient as a legal "basis for a trial and sentence, provided that the "charge and specification taken together amount to a "statement of a military offense, either under a specific "Article or under the general Article."

Dig. Op., J. A. G. (Winthr.), p. 146.

I have been thus particular in the description of military pleadings, because the learned judge below seems, in his opinion, to have labored under a misapprehension in regard to this matter.

It is, of course, conceded at the outset, that the application for the writ of *habeas corpus* cannot be used as a substitute for a writ of error. The authorities in this court, as well as generally, are numerous to that effect. To state the same proposition in other language, it is admitted that no mere error or irregularity in the proceedings of the court-martial can be taken advantage of in this appeal.

Unless I can convince this Court that the military tribunal acted beyond its power in such manner as to render its sentence void, in whole or in part, this proceeding must fail. The court-martial must have exceeded its jurisdiction, somewhere along the line, or appellant cannot prevail.

In determining the question of jurisdiction, however, this court is not limited to a mere inspection of the find-

ing and sentence of the court-martial. It may examine any facts before it, not in contradiction of the record, and if those facts disclose a want of power in the military tribunal to inflict the sentence under any or all of the charges, then I submit that sentence must be held a nullity.

In *ex parte Mayfield*, 141 U. S., 107, this court, speaking by Mr. Justice Brown, said: "This court has held, "however, in a multitude of cases, that it had power to "inquire 'with regard to the jurisdiction of the inferior "court, either in respect to the subject-matter or to the "person, even if such an inquiry involved an examina- "tion of facts outside of, but not inconsistent with, the "record.'" Citing: *Ex parte Carll*, 106 U. S., 521; *Ex parte Bigelow*, 113 U. S., 328; *In re Nielson*, 131 U. S., 176; *In re Cuddy*, 131 U. S., 280.

In the Mayfield case (*supra*) the fact on which the jurisdiction of the United States court depended was the citizenship of the defendant. The indictment was silent as to that, but the petition for the writ of *habeas corpus* alleged petitioner's Indian blood and Cherokee citizenship, and the same was admitted on the hearing. Petitioner was discharged.

In the Nielsen case (*supra*) the defendant in the criminal proceedings (petitioner in the *habeas corpus* case) had been convicted under the Edmunds act for unlawful cohabitation, and was subsequently proceeded against for adultery under the provisions of the act of March 3, 1887. He pleaded that the latter offense formed part of the continuous crime for which he had already been punished, setting out the facts at length. His plea was overruled, and a conviction followed. The prisoner then filed

his application for the writ of *habeas corpus*, setting out all the proceedings in his last trial, including the indictment, the plea of *autre fois convict*, and the demurrer of the government to that plea. This court held that the identity of the two offenses appeared by the admissions of the demurrer to the plea; that the adultery was a constituent part of the original crime; and that the plea of former conviction should have been sustained. The petitioner was discharged.

I.

THE FINDING OF "GUILTY" UNDER CHARGE 4 AND ITS SPECIFICATION WAS BEYOND THE POWERS OF THE COURT-MARTIAL, AND ILLEGAL AND VOID.

It will be insisted here that the court-martial had no jurisdiction to convict or to sentence petitioner under the 62nd article of war, because the offense charged and the evidence adduced in support of the allegations show that. if any offense were committed, it was properly chargeable under article 60 and not under article 62.

Proceeding upon the theory that charge 4 and its specification are eliminated from the case, and that the sentence, if valid at all, must be sustained under charges 1, 2 and 3, it will be urged that, except perhaps for the conspiracy alleged under charge 1, the remaining offenses charged are identical.

If this be true, then it will necessarily follow that at least two different and distinct punishments have been meted out for the same offense, in contravention of the 5th amendment to the constitution.

(A) THE SPECIFICATION WAS WRONGLY LAID UNDER ARTICLE 62.

Charge 4 alleges embezzlement as defined in section 5,488, R. S. U. S., in violation of the 62d article of war. Section 5,488 is as follows: "Every disbursing officer "of the United States who deposits any money intrusted "to him in any place or in any manner, except as auth- "orized by law, or converts to his own use in any way "whatever, or loans with or without interest, or for "any purpose not prescribed by law withdraws from the "treasurer or any assistant treasurer, or any authorized "depository, or for any purpose not prescribed by law "transfers or applies any portion of the public money "intrusted to him, is, in every such act, deemed "guilty of an embezzlement of the money so deposited, "converted, loaned, withdrawn, transferred or applied; "and shall be punished by imprisonment with hard labor "for a term not less than one year nor more than ten "years, or by a fine of not more than the amount embez- "zled or less than $1,000, or by both such fine and im- "prisonment.

The specification under this charge is as follows:

"Specification 1. In that Captain Oberlin M. Carter, "Corps of Engineers, United States Army, being the "officer in charge for the United States of river and "harbor improvements in the Savannah river and harbor "district, and as such officer in charge of said im- "provements, being a disbursing officer of the United "States, and having entrusted to him large sums of "money of the United States, did wilfully and knowingly "apply, for a purpose not authorized by law, large sums "of the said moneys so entrusted to him by wilfully and

"knowingly causing the amounts hereinafter named to "be paid out of the said moneys, which were subject to "his order and control as such officer in charge of "said improvements; the accounts on which the same "were paid being false, the amounts paid not being "due or owing from the United States to the parties "paid or to any one, and he, the said Captain Carter, "well knowing this to be the case, the said accounts, the "amounts paid and the payments being those designated "by the following voucher (and the entries and the en-"dorsement thereon) submitted by the said Captain "Carter with his accounts and marked 'Appropriation "for improving harbor of Savannah, Georgia':

"Voucher No. 8 ($230,749.90), July, 1897,

"and the one indicated and designated by the following "voucher (and the entries therein and endorsements "thereon) submitted by the said Captain Carter with his "accounts and marked 'Appropriation for improving "Cumberland Sound, Georgia and Florida':

"Voucher No. 9 ($345,000), July, 189 ;

"each of the said payments having been caused to be "made on or about July 6, 1897, by the said Captain "Carter drawing and delivering a check as such officer "in charge of river and harbor improvements, by which "the payment was ordered and directed to be made out "of the money of the United States under his control as "such officer."

THE SPECIFICATION WAS WRONGLY LAID UNDER ARTICLE 62 BECAUSE:

(*a*) *The moneys were applied to a purpose prescribed by law.*

The allegation in the specification is the application of

public moneys by the accused as disbursing officer to "a purpose not authorized by law" (the statutory language is a purpose not "prescribed" by law), and this constitutes the gravamen of the offense. Unless the moneys were so applied there was no crime under this particular section, and no jurisdiction to punish under Charge IV.

It appears from an inspection of this specification that the two vouchers, numbered 8 and 9, respectively, the payment of which is alleged to constitute the application of public moneys to a purpose not "authorized" (*sic*, prescribed) by law, were marked, the one: "Appropria-"tion for improving Cumberland Sound, Georgia and "Florida"; the other: "Appropriation for improving "harbor of Savannah, Georgia."

The accused is alleged to have been a disbursing officer who issued the vouchers described and caused them to be paid out of public moneys under his control, marking them "Appropriations, etc." The necessary inference is that the "Appropriations" were made by act of Congress for the purpose stated by accused on the vouchers.

If these vouchers were paid out on works done under an act of Congress and from funds appropriated by such act for such improvements, then it follows they were paid out "for a purpose prescribed by law."

It is to be noted that the specification does not allege that there was no such act of Congress; does not allege that no contracts were made under such act for the improvements named; does not allege that the moneys paid were not paid from a fund appropriated by Congress to the improvements in question; but avers that "the ac-"counts on which the same" (the vouchers named) were

paid "were false, the amounts paid not being due or "owing from the United States to the parties paid or to "anyone," and that Captain Carter knew this fact.

If there be any force in the rule of criminal law that indictments should be drawn with some degree of certainty, then it surely follows from the language of the charge and specification here under consideration that there was an utter failure to charge an offense under Sec. 5,488. More than that. It is submitted that the specification itself affirmatively shows that the money mentioned therein was applied to a "*purpose* prescribed by "law."

But the matter is not left in doubt. The petition for the writ of *habeas corpus* alleges: "It was shown by the evi- "dence before said court-martial * * * that the two sums "of money alleged" to have been misapplied "were paid "out by said Carter under and in accordance with the speci- "fications of two certain contracts between the United "States of America and the Atlantic Contracting Com- "pany, dated October 8, 1896, for the improvement of "Savannah Harbor and Cumberland Sound, respectively, "which said contracts were entered into pursuant to the "act of Congress approved June 3, 1896."

This allegation was nowhere traversed in the return, and thus is admitted by the pleadings to be true, as it is true in fact.

Gould on Pl., § 98 (5th Ed. by Heard).
Stephen on Pl., § 132 (Andrew's Ed.).

There was no pretense before the court-martial, and it cannot truthfully be pretended before this court, that no work was done under these contracts. The only contention was that the materials furnished were inferior, as

set out in the specification under charge 1, and less valuable to the United States. Not of no value whatsoever, but simply less valuable. And the allegation of the specification now being considered, that the amounts paid were not "due or owing," is merely the inexpert pleader's common vice of a negative pregnant. He does not aver that no part of the sums were due, but only that the *exact amounts* were not due or owing.

If, then, it be conceded that there was fraud in the execution of the contracts, and that the accused permitted the contractors to furnish greatly inferior and less valuable material for the works, an admission far more damaging to petitioner than the pleadings justify and yet coextensive with the broadest claim of the prosecution, it follows that while some crime may have been committed by the accused, it was not a crime under the clause of section 5,488 set out in the specification.

In short, Congress appropriated the money disbursed for the "*purpose*" of improving Savannah Harbor and Cumberland Sound. The money was applied by the accused to that "*purpose*" and none other. Therefore his offense, if any, was not as charged in the specification, viz., applying it "to a purpose not authorized by law."

The question here discussed goes, as I shall hereinafter show, to the very root of things. It involves the *jurisdiction* of the court-martial. If it appears, either from the language of the specification, or from the evidence adduced before the court-martial, or from both together, that the vouchers mentioned were paid for a purpose prescribed by law, or if the allegations define a crime set out in any other article of war, then the court-martial was wholly without power to convict or sentence the accused under the 62d article of war.

That the court, on *habeas corpus*, may look into the evidence adduced before the tribunal which imposed sentence on the petitioner, to determine if that tribunal had jurisdiction to try and punish, or, as in this case, to examine the pleadings and give due weight to the admissions therein concerning jurisdictional facts, has been heretofore discussed.

Whatever then may have been the offense of Captain Carter, it was not embezzlement as defined in section 5488, and hence the finding of "guilty" of charge 4 was improper.

Such finding was erroneous for the further reason that,

(b) *The offense attempted to be set out in the specification was wrongly laid under article 62, because* it was not "to the prejudice of good order and military discipline."

The 62d article of war is as follows:

"All crimes, not capital, and all disorders and neglects "which officers and soldiers may be guilty of, *to the* "*prejudice and good order of military discipline, though* "*not mentioned in the foregoing* articles of war, are to "be taken cognizance of by a general or regimental, "garrison or field officers' court-martial, according to "the nature and degree of the offense, and punished at "the discretion of said court."

Sec. 1342, U. S. R. S., par. 62.

The crime charged, whatever its nature, must be "to "the prejudice of good order and military discipline," and it must not be "mentioned in the foregoing articles," or it is not justiciable under article 62.

This is the plain meaning of the article above set out, and the proposition is universally conceded by the text writers.

The subject is discussed at considerable length in Winthrop's valuable treatise on Military Law, from page 1122 to page 1126 (2d Ed.). After remarking that the word "prejudice" is used in the sense of "detriment," the author proceeds to the discussion of the meaning of the term "good order." On page 1123 the following statement is made: "The term 'good order,' inas-"much as most of the cases contemplated by the article "are cases of military neglect and disorders, may be re-"garded as referring mainly to order, that is, condition "of tranquility, security and good government of the "military service. Inasmuch, however, as civil wrongs, "such as injuries to citizens or breaches of the peace, "may, when committed by military persons and actually "prejudicing military discipline, be cognizable by courts-"martial as crimes or disorders, the term 'good order' "may be deemed in cases of such wrongs to include, "with the order of the military service, a reference to "that also of the civil community.

"By the term 'to the prejudice,' etc., is to be under-"stood directly prejudicial, not indirectly or remotely "merely. An irregular or improper act on the part of "an officer or soldier can scarcely be conceived which "may not be regarded as in some indirect or remote "sense or manner prejudicing military discipline, but it "is hardly to be supposed that the articles contemplated "such distant effect, and the same is, therefore, deemed "proper to be confined to cases in which the prejudice "is reasonably direct and palpable. It is also to be "noted that the act or duty neglected must be one which "a military person may legally and properly be called "upon to do or perform. A neglect to comply with a "direction to do something not military but civil in its

"nature, an order to perform which would not be a law-"ful order in the sense of article 23, would not be a "neglect to the prejudice of good order and military dis-"cipline."

On page 1124 he continues: "A crime, therefore, to be "*cognizable* (the italics are mine) by a court-martial under "this article must have been committed under such cir-"cumstances as to have directly offended against the "government and discipline of the military state. Thus "such crimes as theft from or robbery of an officer, "soldier, post trader or camp follower, forgery of the name "of an officer, and manslaughter, assault with intent to "kill, mayhem or battery committed upon a military per-"son, inasmuch as they directly affect military relations "and prejudice military discipline, may properly be, as "they frequently have been, the subject of charges un-"der the present articles. On the other hand, where "such crimes are committed upon or against civilians, "and not at or near a military camp or post, or in "breach or violation of a military duty or order, they "are not in general to be regarded as within the de-"scription of this article, but are to be treated as civil "rather than military offenses."

In the Manual for Courts-Martial, which, as before remarked, has the force of statutory law wherever it is not in contravention of the Constitution or some specific act of Congress, at page 16, par. 7, it is said: "As to whether "an act which is a civil crime is also a military offense "no rule can be laid down which will cover all cases, "for the reason that what may be a military offense "under certain circumstances may lose that character "under others. For instance, larceny by a soldier from "a civilian is not always a military crime, but it may

"become such in consequence of the particular features, "surroundings or locality of the act. What these may "be cannot be anticipated with a sweeping rule, compre- "hensive enough to provide for any possible conjunction "of circumstances. Each case must be considered on its "own facts But if the act be committed on a military "reservation or other ground occupied by the army, or "in its neighborhood, so as to be in the constructive "presence of the army; or if committed while on duty, "particularly if the injury be to a member of the com- "munity whom it is the offender's duty to protect; or "if committed in the presence of other soldiers, or while "in uniform; or if the offender use his military position "or that of another for the purpose of intimidation or "other unlawful influence or object, such facts would be "sufficient *to make it prejudicial to military discipline* "*within the meaning of the 62nd article of war.*"

It is manifest from the context in the last quotation that the commission of the offense "while on duty" means the "duty" of the officer while with his command, or, if detached, while on temporary duty—such "duty," *e. g.*, as is contemplated by the article denouncing the penalty of dismissal against an officer for being drunk on duty. (Art., 38.)

If the rule of the criminal law, in countries subject to Anglo-Saxon jurisprudence, that statutes denouncing penalties must be strictly construed, and cannot be aided by strained inference, have any application to our military criminal code—and it is submitted that a contrary rule would be abhorrent to our developed sense of justice—then the foregoing argument is greatly enforced. To illustrate: in its widest meaning the phrase "the "prejudice of good order and military discipline" would

embrace any possible misconduct of a soldier, no matter where committed nor what the surrounding circumstances. It would cover the personal altercation of a soldier, on furlough, not in uniform and far removed from any military command or reservation. That such interpretation is not the law is fully shown by the quotation from the authoritative Manual, *supra*.

The phrase must, therefore, be given a narrower meaning—a meaning that cannot properly include the offense alleged against Captain Carter under charge IV.

It may not be inappropriate at this point to digress for a moment, for here lies the fundamental vice of the whole proceeding against petitioner.

The case against him was one that a court-martial is peculiarly unfit to try; not because, as a general proposition, its members are not honest and well meaning, not because our army officers are not capable in their profession, but because by training and education they are in nowise prepared for the intelligent handling of such a case. Above all, the archaic procedure of courts-martial renders such a body totally unfit to grapple with complicated problems of engineering and recondite questions of law, such as arose in the trial of Captain Carter.

This procedure has long since been abandoned by all civilized nations. The English, from whom we inherited it, have provided a civil lawyer, trained in his profession (now Mr. Justice Jeune), whose duty it is to preside over the court-martial and pass on all questions of law and of evidence arising during the trial; while the judge-advocate is relegated to the single duty of a prosecuting attorney. Thus the practice is completely assimilated to our trial by jury—the most magnificent triumph of

modern civilization, the unique possession of English and American jurisprudence. The judge-advocate is shorn of his medieval functions; he no longer represents both the accused and the government, at the same time acting as the legal adviser of the court—a position which, in a hotly contested trial such as Carter's, poor human nature is utterly incompetent to fill; in which, as remarked by an old writer (Adye): "If then *he* errs, all may go "wrong."

These remarks, may it please the court, are neither out of place nor *dehors* the record. An examination of the petition herein will disclose that this petitioner was arraigned on thirty-seven specifications grouped under four charges. Of those thirty seven specifications, seventeen were barred on their face by limitations. Notwithstanding the provision of the 10:d article of war that "No "person shall be liable to be tried and punished by a "general court-martial for any offense which appears to "have been committed more than two years, &c.," the pleader deliberately drew seventeen charges against this petitioner, alleging in each facts which affirmatively and distinctly showed each to be within the bar of the statute.

To the civilian lawyer this might appear a trivial thing. Far otherwise is it to a court-martial. For some occult reason the plea of limitations, notwithstanding Mr. Justice Story's eloquent defense of the wisdom of the law in barring, by lapse of time, stale prosecutions; notwithstanding these "statutes of repose" are at once the shield of innocence and the sword against the blackmailer, this plea, I say, is regarded in our army with great disfavor, and almost as tantamount to a confession of guilt. It requires moral courage of no mean order for an accused officer to invoke its protection.

The motive of the special pleader of these unsigned charges is thus not far to seek.

Of the twenty specifications remaining, the accused was acquitted of four, and of the other sixteen, the president disapproved the finding of "guilty" of twelve, because *not supported by the evidence.*

Incalculable injury had been done this petitioner at the outset by the very multiplicity of the charges. Nor was it to be expected that the members of the court-martial, untrained in law, would be able to segregate the testimony adduced under each separate alleged offense, and not carry in their minds one line of evidence over to some charge to which it was wholly irrelevant, to the great prejudice of the accused. That some malign influence was at work clearly appears from the finding of guilty by the court of twelve specifications (charging eight wholly disconnected offenses) out of a total of sixteen, which finding the president, on the recommendation of the attorney general, *disapproved because of failure of proof.*

See Op. Atty. Genl., Sept. 29, 1899.

This digression, it is hoped, is not impertinent. When we reflect on what grave injustice has been possible under this outworn and inadequate procedure; when we call to mind the fate of Admiral Byng, shot, as Voltaire said, "to encourage the others;" when we, with shame, recall the hanging of a woman, in all human probability wholly innocent, and when we reflect that now some ten millions of people, mostly of an alien race, are subject to these tribunals, we may well pause.

It is to the eternal glory of this court and of one of its former members, the petitioner's great advocate, that the illegal sentence was stayed in Milligan's case. To our

dishonor we permitted the hanging of Mrs. Surratt, though Lee had surrendered; though no foe menaced our capital; and though our civil courts were open and jurors there were only waiting to take their seats in the box. "It was simply one of the many instances," says Morse, "furnished by the war, of the homage which necessity "pays to law and which law repays to necessity."

Morse, Life of Lincoln, Vol. 2, p. 351.

It is to be hoped that the feudal age of such homage is past, and that hereafter our courts martial will do homage to law and swear fealty to justice.

(B) THE CRIME CHARGED, IF "MENTIONED IN THE "FOREGOING ARTICLES OF WAR" MUST NOT BE LAID UNDER ARTICLE 62.

(a) *It was clearly covered both by par. 1 and by par. 4 of the 60th article of war.*

The 60th article is as follows (the paragraphs being numbered for convenience):

"Article 60. Any person in the military service of "the United States

"1. Who makes or causes to be made any claim "against the United States or any officer thereof, know- "ing such claim to be false or fraudulent; or,

"2. Who presents or causes to be presented to any "person in the civil or military service thereof, for ap- "proval or payment, any claim against the United States "or any officer thereof, knowing such claim to be false "or fraudulent; or

"3. Who enters into any agreement or conspiracy to "defraud the United States by obtaining, or aiding "to obtain, the allowance or payment of any false "or fraudulent claim; or

"4. Who, for the purpose of obtaining, or aiding "others to obtain, the approval, allowance or payment of "any claim against the United States or against any offi- "cer thereof, makes or uses, or procures or advises the "making or use of, any writing, or other paper, know- "ing the same to contain any false or fraudulent state- "ment; or

"5. Who, for the purpose of obtaining, or aiding "others to obtain, the approval, allowance or payment "of any claim against the United States or any officer "thereof, makes or procures or advises the making of, "any oath to any fact or to any writing or other paper, "knowing such oath to be false; or

"6. Who, for the purpose of obtaining, or aiding "others to obtain, the approval, allowance or payment of "any claim against the United States or any officer thereof, "forges or counterfeits, or procures or advises the forg "ing or counterfeiting or any signature upon any writing "or other paper, or uses or procures or advises the use "of, any such signature, knowing the same to be forged "or counterfeited; or

"7. Who, having charge, possession, custody or "control of any money or other property of the United "States, furnished or intended for the military service "thereof, knowingly delivers or causes to be delivered to "any person having authority to receive the same, any "amount thereof less than that for which he receives a "certificate or receipt; or

"8. Who, being authorized to make or deliver any "paper certifying the receipt of any property of the "United States, furnished or intended for the military "service thereof, makes or delivers to any person such "writing, without having full knowledge of the truth of

"the statements therein contained, and with intent to de-
"fraud the United States, or

"9. Who steals, embezzles, knowingly and wilfully
"misappropriates, applies to his own use or benefit, or
"wrongly or knowingly sells or disposes of any ord-
"nance, arms, equipments, ammunition, clothing, sub-
"sistence stores, money, or other property of the United
"States, furnished or intended for the military service
"thereof; or

"10. Who knowingly purchases or receives in pledge
"for any obligation or indebtedness, from any soldier,
"officer or other person who is a part of or employed in
"said forces or service, any ordnance, arms, equipment,
"ammunition, clothing, subsistence stores, or other
"property of the United States, such soldier, officer or
"other person not having lawful right to sell or pledge
"the same,

"Shall, on conviction thereof, be punished by a fine
"or imprisonment, or by such other punishment as a
"court-martial may adjudge."

1st. The facts set out in the specification to charge IV charge an offense under either Par. 1 or Par 4 of Article 60, at the pleader's option.

The offense described in the specification is that Captain Carter, an officer in the United States Engineer Corps, being in charge of the Savannah engineering district, and being a disbursing officer with funds of the United States under his control, misapplied such funds, because the accounts on which they were paid were false, the amounts paid not being due or owing to anyone, and that Carter knew the accounts were false and the money not due to any person, the misapplication being made by means of two certain vouchers described, which were

paid by checks drawn by said Carter as such disbursing officer. These facts, the pleader alleged, constituted an application of such moneys to a purpose not authorized (prescribed) by law, and hence embezzlement as defined by Sec. 5,488, R. S. U. S. If now we set down in parallel columns the facts alleged in the specification and the essential facts necessary to be proved under paragraphs 1 and 4 of artice 60 above, it will be clearly seen that the offense charged by the specification could, and should, have been laid under said article 60 and under Par. 1 or Par. 4, at the pleader's option.

Article 60, *Par. 1.*	Charge 4, *Specification.*	Article 60, *Par. 4*
Any person in the military service of the United States;	Captain Carter of the U. S. Engineers, a disbursing officer in charge of certain river and harbor improvements;	Any person in the military service of the United States; who
Causing a claim to be made against the United States;	Caused money of the U. S. to be paid out on a claim of the Atlantic Contracting Co., by the use of certain vouchers;	Aids others to obtain the payment of any claim against the U. S., by making any writing;
knowing such claims to be false.	knowing the accounts to be false and the amounts not to be due.	knowing the same to contain any false statement.

It will be seen from the foregoing that the only difference between the 1st and 4th paragraphs, so far as they affect the case at bar, consists in the *means* of making the false or fraudulent claim. In Par. 4 there must be a writing containing a false statement, known by the offender to be false; in Par. 1, no matter how the claim be made, whether orally or in writing, if it be knowingly false, the person in the military service is guilty under the statute. In the case against Captain Carter the pros-

ecutor might have alleged the causing of the false claim to be made, and shown in evidence the alleged fraudulent vouchers and checks; or he might specifically have set out such vouchers and checks as the means whereby the fraudulent claim was preferred; in which event the government, on the trial, would have been restricted to the very means alleged.

Under charge 4, it is alleged that Captain Carter, being a disbursing officer and in the engineer corps, *i. e.*, "in the military service," caused money of the United States to be paid out to the Atlantic Contracting Company, *i. e.*, "caused to be made" a "claim against the United States" (under Par. 1); or aided "others to obtain the payment" of a claim (under Par. 4); on vouchers submitted by Captain Carter, *i. e.*, by making a writing (under Par. 4); Carter "well knowing" the accounts to be false, *i. e.*, "knowing the same to "be false" (under Par. 1), or to contain" a "false statement" (under Par. 4).

The allegation under charge 4 that Captain Carter did "apply for a purpose not authorized by law large sums of money," the property of the United States, is a mere conclusion of law by the military pleader, made, perhaps, with the notion that by such an averment he could bring the offense set out in the specification under section 5,488, R. S. U. S.

It is as if a common law pleader had drawn an indictment charging that A. B. did feloneously, etc., commit mayhem upon the body of C. D. by cutting off his ear. The allegation in the indictment that the act of cutting off the ear is mayhem, of course, does not make it mayhem.

The learned judge below was quite in error in his conclusion that it was the province of the court-martial to determine whether or not the acts described in the specification constituted embezzlement within the meaning of section 5,488, or were prejudicial to good order and military discipline; and that having so determined, its action is not reviewable in a proceeding of this kind.

As I shall hereafter show, the question is one of power, of jurisdiction, and therefore one that can and must be determined on *habeas corpus*. As well might it be said that the court-martial having jurisdiction to pass upon the plea of *autrefois acquit* or *convict*, its decision is final, and this court is without power, on *habeas corpus*, to inquire if the fifth amendment to the constitution has been violated by the overruling of such plea. The vice in the reasoning of the court below is that it failed to recognize the question as being jurisdictional.

Ex parte Nielsen, 131 U. S., 176.

(*b*) *The offense set out in the specification to charge 4 is specifically covered by Par. 9 of article 60, inasmuch as the money alleged to have been embezzled was money "intended for the military service."*

Paragraph 9 reads as follows:

"Who steals, *embezzles, or knowingly and wilfully misappropriates* or wrongfully disposes of * * * any "ordnance, arms, *money* or other property of the United "States, *furnished or intended for the military service* "*thereof*, shall be punished, etc."

It will be conceded that Captain Carter was in the military service, and that he had entrusted to him moneys of the United States. If he paid out such public moneys on false or fraudulent vouchers knowingly, then it fol-

lows that such payment was a "misappropriation" or wrongful disposal of such moneys as that word is used in Par. 9. The specification under charge 4 expressly charges him with applying such moneys to a purpose not authorized by law, that is to say, with a misapplication of the same.

In re Carter, 97 Fed. Rep., 496.

The only question then remaining is whether or not the money under his control was "furnished or intended "for the military service" of the United States as that phrase is used in the article of war.

This is shown:

1. By the whole course of legislation on the subject.

2. Because the very right of Congress to use the people's money for river and harbor improvements is derived largely from the "war powers."

3. The organization of the corps of engineers indicates the same result.

4. The letter and spirit of article 60.

Of these in their order:

1. The course of Congressional legislation on the subject.

The three great departments of our government for the support of which Congress appropriates money are the military service, the naval service and the civil service. R. S. U. S., Sec. 3633.

The war department is "the military branch of the "service."

Dig. Op. J. A. G., 275, Par. 2.

At the outset it is to be observed that the language of the article is not for military service or for military purposes, but for THE military service. This use of the particle "THE" is significant, for it makes the phrase "the military service" a collective noun with a meaning equivalent to "The War Department," with all things coming under it or subject to its control. Thus, it would seem to follow that Congress had in mind moneys furnished or intended for that BRANCH OR ARM OF THE GOVERNMENT SERVICE HAVING IN CHARGE THE EXECUTION OF THE DUTY FOR WHICH THE MONEY WAS APPROPRIATED, and NOT the OBJECT TO BE ACCOMPLISHED.

In the general appropriation for "the military service," we find numerous appropriations for internal improvements and the improvement of rivers and harbors.

In 1819, in the general appropriation act, entitled "An Act making appropriations for the military service "of the United States for the year 1819," is an appropriation "for making survey of the watercourse tributary to and west of the Mississippi," as well as one for marking and running the boundary line of the several cessions of land made by the Indians.

See

U. S. Stat. at L., Vol. 3, pp. 480, 431.

In 1820, in the general appropriation act for that year for "the military service," is an appropriation for completing the public road through the Creek Nation, between the States of Georgia and Alabama, as well as an appropriation for a survey of the Ohio and Mississippi rivers.

U. S. Stat. at L., Vol. 3, pp. 562–3.

In the general appropriation for "the military service" for the year 1821 is a further appropriation for completing the Creek road.

U. S. Stat. at L., Vol. 3, pp.

In the general appropriation for "the military service" for the year 1822 is an appropriation "for the sur-"vey of certain ports and harbors."

U. S. Stat. at L., Vol. 3, pp. 686–688.

In the general appropriation for "the military service" for the year 1825 is an appropriation "for making "surveys and carrying on the operations of the board of "engineers in relation to internal improvements."

U. S. Stat. at L., Vol. 4, p 82.

In the general appropriation for "the military service" for the year 1826 are appropriations for completing the repair of Plymouth Beach and for the continuance of the Cumberland Road, and "for completing the "work of deepening the channel of entrance into the "harbor of Presque Isle;" and also for defraying the expenses incidental to making examinations and surveys preparatory to and in aid of the formation of roads and canals.

U. S. Stat. at L., Vol. 4, pp. 150 151.

In the general appropriation for "the military service" for the year 1827 is an appropriation for constructing the road from Canton to Zanesville, in the State of Ohio, and for continuing and completing the survey of the Cumberland road, and "for completing the works "and deepening the channel of entrance into the harbor "of Presque Isle." And also "for improving the navi-"gation of the Ohio and Mississippi Rivers."

See

U. S. Stat. at L., Vol. 4, pp. 214-6.

In the general appropriation for "the military service" for the year 1828 is an appropriation for a road from Little Rock to Cantonment.

U. S. Stat. at L., Vol. 4, pp. 247-259.

In the general appropriation for "the military service" for the year 1829 is an appropriation "for the "preservation of the point of land forming Province-"town harbor," and "for removing obstructions in the "harbor of Mobile," and "for piers at New Castle."

U. S. Stat. at L., Vol. 4, pp. 248-249.

In the general appropriation for "the military service" for the year 1831 is an appropriation "for completing the Mars Hill road."

U. S. Stat. of L., Vol. 4, pp. 465-467.

And in the general appropriation "for the support of the army" for the years 1841, 1842, 1843, 1844, 1845, 1846, 1849, 1851, 1852, 1853, 1854, 1856, 1858 and 1860, are appropriations for running boundary lines; for arrearages and for the preservation of the public property at the several places of harbor and river improvements; for building and repairing the necessary boats for carrying on the improvements on the Missouri, Mississippi, Ohio and Arkansas rivers; for the preservation and repair of public works heretofore constructed for the improvement of harbors; for the continuance of the surveys of the northern and northwestern lakes; for defraying the expenses of topographical surveys of routes from the valley of the Mississippi to the Pacific Ocean; for continuing the topographical and hydrographical survey

of the delta of the Mississippi, with such investigations as may lead to determining the most practical plan for securing it from inundation; for fuel and quarters, and for mileage and transportation for officers and enlisted men of the army serving on the coast survey; for building an iron steamer to be used in the survey of the northern and north-western lakes; for continuing the exploration and surveys to ascertain the best route for a railway to the Pacific, and for the construction of bridges and the improvements of the crossings of streams on the road from Fort Smith, in Arkansas, to Albuquerque, in New Mexico.

See U. S. Stat. at L., Vol. 5, pages 433–435; pages 508, 510; pages 603–606; pages 745–747; Vol. 9, page 7; pages 370–372; pages 504–507; pages 618–620; Vol. 10, pages 105–107; pages 214–217; pages 576–578–582; Vol. 11, pages 147–150; pages 322–333–336; Vol. 12, page 66; page 466.

By the act of June 28, 1864, entitled "An act to pro-"vide for the repair and preservation of certain public "works of the United States," it was enacted that the sum of $100,000 be appropriated "to be expended under "the direction of the secretary of war in repairing and "rendering useful for purposes of commerce and navi-"gation such of the public works connected with the "harbors on the seaboard of the United States as may, "in his judgment, need such expenditure."

See,

U. S. Stat. at L., Vol. 13, pp. 200–201.

Since that act the statutes authorizing the construction of works of river and harbor improvement have provided that the sums appropriated shall be expended under the direction of the Secretary of War and all works of river and harbor improvement are now expressly assigned by Congress to the War Department for the of the engineer bureau of the army as the executive branch of the government to carry out the same.

See,

See Section 231, R. S. of the U. S.

To facilitate the prosecution of projected improvements, the power is expressly conferred upon the Secretary of War to institute proceedings for condemnation of land or for its purchase, or to receive donations of lands or materials required for the maintenance or prosecution of such works.

See,

Act of April 24, 1888, 25 Statutes at Large, 94.

He is also expressly charged with the application of appropriations for river and harbor improvements and with the letting of contracts for work to be done.

By the act of August 11, 1888, it is provided:

"That it shall be the duty of the Secretary of War to "apply the money herein and hereinafter appropriated "for improvements of rivers and harbors other than "surveys, estimates and gaugings, in carrying on the "various works by contract, or otherwise, as may be "most economical and advantageous to the government. "Where such works are done by contract, such contracts "shall be made after sufficient public advertisement for

"proposals in such manner and form as the Secretary of "War shall prescribe, and such contract shall be made "with the lowest responsible bidders, accompanied by "such securities as the Secretary of War shall require, "conditioned for the faithful prosecution and completion "of the work, according to such contract."

25 Statutes at Large, page 400.

The very appropriation out of which it is alleged the moneys were embezzled by Captain Carter provides, chapter 314: "An Act making appropiations for the "construction, repair and preservation of certain public "works on rivers and harbors, and for other purposes.

"Be it enacted by the Senate and House of Represen-"tatives of the United States of America in Congress as-"sembled, that the following sums of money be and are "hereby appropriated to be paid out of any money in "the treasury, not otherwise appropriated, to be imme-"diately available, and to be expended *under the direction "of the Secretary of War and the supervision of the "Chief of Engineers for the construction, completion, "repair and preservation of the* public works herein-"after named.

"Harbor of Savannah, Georgia; continuing improve-"ment, $5,000; provided, that contracts may be entered "into by the Secretary of War for such materials and "work as may be necessary to complete the project of "further improvement, recommended by Captain Ober-"lin M. Carter, in his reports of December 7, 1894, and "April 1, 1895, and to complete the project for the "steamboat channel between Beaufort, South Carolina, "and Savannah, Georgia, recommended by Captain "Oberlin M. Carter, in his report of December 4, 1895.

"and mentioned in that report as route two; to be paid "for as appropriations may, from time to time, be "made by law, not to exceed the amount of $1,000,000, "exclusive of amount herein or heretofore appro- "priated."

By this series of legislation alone there would seem to be no room for doubt that all moneys appropriated for the improvement of rivers and harbors prior to the year 1864, and assigned to the War Department for execution, and all moneys for those improvements since the year 1864, were considered by Congress as moneys appropriated for "the military service."

The act of March 2, 1895, 28 Stat. L., 787, and Sec. 228 R. S. require the Secretary of War to lay before Congress a statement as to the expenditures in the military establishment. River and harbor works come under this head, and the treasury estimates show that the funds asked for are considered as for "the military service."

The act of April 20, 1897, 18 Stat. L., 33, requires all disbursements by officers in the military establishment to be made by officers of the army. River and harbor funds are inspected by such officers, but NOT any funds which are not for "the military service," such as for lighthouses, etc.

The comptroller of the United States has also considered river and harbor funds as furnished for "the military service," for he has decided that certain purchases cannot be made from appropriation for river and harbor improvements, or from ANY OTHER APPROPRIATION FOR THE MILITARY ESTABLISHMENT. (3 Dig. Comp. Dec., 321.)

Sec. 3417 R. S. U. S. requires all contracts for the

"military service" to be made by the secretary of war. The contracts under which the petitioner disbursed the money in question were made, as shown by the record, by the secretary of war

2. The very right of Congress to use the people's money for river and harbor improvements is derived largely from the war powers of the government.

In the early period of our Republic it was doubted that Congress had any power whatever to expend the general moneys of the people for improvements within the boundaries of individual states. It was conceded that such power did not reside in the Continental Congress; and therefore, since it was not one of the inherent powers of all governments, it must be found, if it existed at all, in the Constitution.

Two clauses of that instrument were supposed to cover it: the war power, and the power to regulate commerce. These powers were not supposed to be co-extensive, as applied to this particular subject-matter, but as the nature or purpose of the improvement varied, so it came more under one or the other of the powers named.

The question, therefore, as to whether or not these moneys were "furnished or intended for the military service" goes to the very root of our institutions, and becomes at once a constitutional question of grave magnitude.

In 1816 Calhoun advocated internal improvements (roads and canals) to be paid for out of the dividends of the government from the Bank of the United States:

V. Abridg. Debates, 682;

and found the constitutional authority principally in the war powers.

V. Abridg. Deb., 705.

Jefferson and Madison in various messages to Congress denied the right; but Congress has steadily appropriated increasing sums for the purpose.

Kent states the right to be derived from the war and commerce powers.

1 Kent, Comm., 268.

3. The organization and duties of the United States engineer corps make it clear that moneys appropriated for river and harbor improvements, and confined to the control of the war department, are, in the contemplation of Congress, "furnished or intended for the military "service."

1st. The engineer corps of the army was constituted by the act of May 9, 1794. It was given no specific duties, but was placed generally under the orders of the president to perform proper services on the coasts or the frontiers.

In 1813 the topographical department of the corps was constituted, clearly indicating that the works of topography and surveys were regarded by Congress as a branch of the service falling within the appropriate duties of the engineer corps.

In 1818 the provisions of the act of February 10, 1807, which authorized the employment of persons in the making of surveys of the coasts other than persons belonging to the army and navy, were repealed.

See

Act of April 14, 1818, U. S. Stat., Vol. 3, page 425.

In 1821, when the army was reorganized, the corps was continued exactly as it had previously existed, and

in 1838 its topographical branch was increased and the employment of civil engineers to aid it was forbidden.

By this legislation it thus clearly appears that Congress early determined that the works of internal improvement could best be carried out by that branch of the military service constituted as the engineer corps.

2nd. The duties of the engineer corps were also early prescribed in the army regulations as covering the execution of river and harbor improvements, which provisions have been continued in the regulations now in force. The duties of the corps of engineers are defined as follows: "The duties of the corps of engineers comprise "reconnoitering and surveying for military purposes; "selection of cities and formation of plans and estimates "for military defenses; construction and repair of fortifi- "cations and other accessories, planning and superintend- "ing defensive or offensive work of troops in the field; "examination of routes of communication, for sites and "for military movements and construction of military "roads and bridges; *execution of river and harbor im-* "*provements* assigned to it, and such other duties as "the President may order."

See Army Regulations, Article 82, Sec. 1,472.

It is also provided: "Engineer officers engaged in the "construction of fortifications or other public works are "entitled to allowances of quarters, mess rooms and "kitchens, with fuel for the same, as are provided by "regulations for officers at garrisoned posts."

See section 1,484.

It is also provided: "Officers of the corps of engi- "neers, or those on engineer duty traveling on service "connected with fortifications or works of public im-

"provement, will be paid their travel allowances *from* "*the special appropriation for the work.* When travel- "ing on any other duty, the mileage will be paid by that "branch of the service entrusted with such payments for "the army."

See section 1,487.

These regulations were issued by the Secretary of War under direction of the President, and have the force of law.

Speaking of the control of harbor improvements, Mr. Justice MILLER, in *Wisconsin* v. *Duluth* (96 U. S., 379), said: "The operations of the government in this regard "have been conducted by the Bureau of Engineering as "part of the War Department, to which Congress has con- "fided the execution of its wishes in all these matters. "That department has mapped out in suitable geograph- "ical divisions the work thus imposed upon it, and placed "these under the control of officers who are in charge of "them. For many years past Congress has been in the "habit of passing an annual appropriation bill, called the "river and harbor bill, confined to works of this class "exclusively. The money thus appropriated is expended, "as we have said, under the direction of the War Depart- "ment."

See, also,

South Carolina v. *Georgia*, 93 U. S., 4.

There can be no room for controversy or doubt that, from the earliest period of the national government down to the present time, the improvement of rivers and harbors has always been considered as appropriately belonging to *that branch of the military service known* as the corps of engineers.

3rd. The accused was thus performing the very duties expressly enjoined upon him as an officer *in the military service.*

He was subject at all times to the army regulations and received his pay and allowances in accordance therewith.

He disbursed all moneys for rivers and harbors and accounted for all property purchased with said moneys in accordance with those military regulations, and none other.

In nothing that he did as an officer in charge of river and harbor improvements was he in the service of any other department of the government than *the military establishment* or governed by any other rules and regulation than those of *the military service.*

As said by Mr. Justice MILLER: "It is impossible to "hold that men who are by statute declared to be a part "of the army, who may wear its uniform, whose name "shall be borne on its register, who may be assigned by "their superior officers to specific duties by detail as "other officers are, who are subject to the rule and arti- "cles of war, and may be tried, not by a jury as other "citizens are, but by a military court-martial for any "breach of those rules, and who may finally be dis- "missed on such trial from the service in disgrace, are "still not in the military service."

U. S. v. *Tyler*, 105 U. S., 244.

See, also,

U. S. v. *Latourette*, 151 U. S., 572.

U. S. v. *Morton*, 112 U. S., 1.

The duty of an engineer officer on public work is a military duty, because such duty is under the military establishment.

Dig. Op. J. A. G., 67, Par. 12.

It was asserted below by the counsel for the government that our contention was "because these works be-"ing carried out by the officers of the engineer corps "the moneys in contemplation of law must be regarded "as having been 'furnished' or intended for the mili-"tary 'service.'" No such position has ever been assumed by the petitioner. The status of the men distributing the funds has nothing to do with the character of the moneys distributed.

The argument hereinabove concerning the duties of the engineer corps in no sense attempts to deduce the military character of funds for river and harbor work from the *status* of the disbursing officers. The rational deduction is that Congress has always deemed the work military work, and hence the funds are for the military service.

Equally unsound is the position of the counsel for the government, assumed below, that any duty which an army officer is called upon to perform is a military duty; and we do not understand the Runkle case (19 Ct. Cls., 4) to so decide. A soldier is on military duty when he is employed in the military service of the United States. He can be employed to discharge civil functions only when express authority is given by some act of Congress.

Runkle case, *supra*.

Dig. Op. J. A. G., 118, Par. 9.

Whatever may be the duties discharged by the officer, the funds disbursed by him are impressed with their character by the act appropriating them. For example: Formerly the weather bureau was a part of the military establishment and its funds were appropriated under and disbursed as moneys furnished for the military service;

but later the bureau was transferred to the Department of Agriculture, and its funds are appropriated as civil service funds. These funds are devoted to precisely the same purpose and disbursed still by officers of the army. In like manner funds for lighthouses belong to the Treasury Department, and funds for Indians to the Interior; in both cases they may be disbursed by army officers; in neither are they furnished for the "military," but in all for the "civil service."

It was asserted on the part of the government that "the "war department is a part of the civil establishment of "the government." No authority is cited, the statement being the mere *ipse dixit* of counsel. If it be true, not only is Sec. 3623 R. S. U. S. made senseless, but the English language becomes incapable of expressing definite ideas.

4. The letter and spirit of the 60th article of war require that moneys lawfully in the custody of a person in the military service be deemed as "furnished or in-"tended" for that service.

The 60th article of war consists of sections 1 and 2 of the act of March 2, 1863, chapter 67, entitled, "An Act "to prevent and punish frauds upon the government of "the United States."

The act of 1863 applied to all persons "in the military "service."

At the time of the passage of that act, as well as at the time of the adoption of the present articles of war, on June 20, 1874, the corps of engineers had long been recognized as one of the regularly constituted and most important arms of "*the military service*," to the officers of which had been entrusted by law, for years, the

charge of all works of internal improvement carried on by the government, including the improvement of rivers and harbors, in the execution of which many millions of dollars had been expended in the past, and many millions more would be expended in the future.

It is inconceivable that in enacting a statute providing for the punishment of frauds upon the treasury *by persons "in the military service,"* Congress should have entirely overlooked, and in fact, if the decision of Judge Lacombe be correct, intentionally excluded from its provisions all money legally in the custody of officers of the engineer corps of the army for the improvement of rivers and harbors, and should have left the fraudulent misappropriation of such moneys, furnished for and disbursed by officers in the military service in the execution of their regular military duties, to be covered simply by a "catch-all" clause intended to cover offenses against military discipline, inadvertently not otherwise provided for.

The plain and obvious meaning and intention of the statute is to punish persons *in the military service* for defrauding the government *while disbursing funds appropriated for the use of that branch of the public service to which they belong.*

Judge Lacombe drew the conclusion that because the appropriation for the "War Department," containing a further appropriation for Savannah harbor, also contained an appropriation to be expended under direction of the Secretary of War, acting through officers of the army, for the care of the "Smithsonian Grounds," the "laying of asphalt walks around the Judiciary Square, in "the City of Washington," the "lighting of public

"grounds," and the "ordinary care of greenhouses and "nursery at the executive mansion," which latter appropriation the learned judge said surely were not furnished or intended for the military service, neither were the appropriations for river and harbor improvements, because they were of the same class.

It is respectfully submitted that neither the premises nor the conclusions of the learned judge are correct.

In the first place, the improvement of rivers and harbors have relation, not only to the commercial interests of the nation, but also to its naval and military operations.

The navigability of the rivers and harbors is of the greatest importance to its effectual defense, and is as necessary to its safety as are its military posts and fortifications.

In the reports of engineer officers to Congress enumerating, as required by law, reasons why certain rivers or harbors should be improved by the general government, the value of such improvement for the purposes of military or naval operations is given, and is often a largely controlling factor in determining the undertaking of a work of improvement.

See

Act of June 23, 1866, 14 Statutes at Large, 70, 71.

The improvement of the grounds around the City of Washington, on the other hand, has no relation whatsoever to the military operations of the government.

It is, however, respectfully submitted that the learned judge was not warranted in his conclusion that moneys

furnished for the improvement of the grounds around the City of Washington were not moneys "furnished or "intended for the military service," within the meaning of the 60th article of war.

By an act of Congress, the care of those grounds was transferred to the Department of War and placed under the custody and control of a branch of the military service, that is, the engineer corps of the army.

Hence, all moneys appropriated for that purpose, since that transfer, were furnished and intended *for the branch of the service having in charge the execution of the work, viz., the military service*, and a wilful misappropriation by an officer of the army of the moneys received by him in his official capacity would be punishable under the 60th article.

If public moneys for the improvement of rivers and harbors are not for the *military* service, then they must either be for the *naval* or for the *civil* service; *there are no other governmental services*. It will doubtless be conceded that such funds are not for the *naval* service. They must then be for the *civil* service, and must, therefore, be accounted for to the chief of that branch or department of the civil service for which they were furnished or intended, and must be disbursed according to the regulations governing said department. But what department? By express statute they are furnished or intended for the War Department, yet this department comprises *the military service* of the United States, *and none other*.

Colonel Winthrop, the leading American writer on military law, entertains this opinion. Speaking of the special statutory embezzlements defined in sections 5,488,

5,491 and 5,492, R. S. U. S., the author says: "These "acts, though in terms made the subject of trial and pun- "ishment by the United States civil tribunals, are, when "committed by *military* disbursing officers, properly "taken cognizance of by courts-martial under article 60."

Winthrop, Mil. Law (2d Ed.), p. 1097.

To Recapitulate.

(A) The specification was wrongly laid under article 62, because:

(1) The moneys were applied to a purpose prescribed by law.

(2) The alleged embezzlement was not "to the prejudice of good order and military discipline."

(B) The specification should have been laid under article 60, because:

(1) The offense described is covered by paragraph 1 and by paragraph 4 of article 60.

(2) The offense described is covered by paragraph 9 of article 60, since the money was "furnished or intended for the military service."

If I have been at all successful in the foregoing argument, there then remains the question of the legal consequence of laying the specification under the 62d, instead of under the 60th article, where it properly belonged.

The contention of the petitioner is that the action of the court-martial in finding petitioner guily of charge 4 was a nullity, and no sentence could lawfully be imposed under such finding for lack of jurisdiction.

The 62d article of war was intended as a drag-net

wherewith to catch all offenders whose acts could not properly be laid under some other specific article, provided such acts were subversive of military discipline.

2 Winthrop Mil. Law, p. 118 (2nd Ed.).

It is the rule of our military law, knowing no exception, that if any offense can properly be laid under some other specific article, it must not be laid under the general or 62d article.

Commenting on the phrase, "though not mentioned in "the foregoing articles," Winthrop says: "The con- "struction of these words has uniformly been that they "are words of limitation, restricting the application of "the article to offenses not named or included in the ar- "ticles preceding."

2 Winthorp, *loc. cit.*, 1126.

Benet (Military Law, p. 53) uses this language: "When, "therefore, the specified facts and circumstances clearly "point to a particular article, with a distinct penalty at- "tached, the pro ecution must be had under that article, "and the *charge should be expressed in the terms used* "*therein*. (Italics are the author's.)

"Where an offense is clearly defined in a specific ar- "ticle it is irregular and improper to charge it under "another specific article. So, where the article in which "the defense is defined makes it punishable to the ex- "clusion of any other, it is error to charge it under an "article, such as the 62d, which leaves the punishment "to the discretion of the court."

Dig. Op. J. A. G. (Winthrop), p. 146.

The 60th article has attached to it a peculiar penalty not found in any other and prescribed by the 100th ar-

ticle, referred to hereinbefore in a slightly different connection. It is that the offense, if it involve fraud or cowardice, shall be published at the accused officer's home, and thereafter "it shall be scandalous for any officer to "associate with him." This additional punishment, which is a life sentence, is not left to the discretion of the court, but is mandatory under the paragraphs of article 60, under which this specification properly belongs (the 1st, 4th or 9th).

In the opinion of the Circuit Court for the Southern District of New York, in petitioner's first application for a writ of *habeas corpus*, Judge LACOMBE says: "It "would seem to follow that, where an offense is found "to be specifically provided for in any of the articles "prior to the 62d, the grant of jurisdiction to try and "punish such offense is conferred by the particular "article which mentions it, and not by the general lan- "guage of the 62nd article. This proposition has com- "mended itself to text writers (Davis, Mil. Law, pp. "70n–71; Winthrop, Mil. Law (2d Ed.), pp. 1126, "1227), and is in accord with general principles of statu- "tory construction (*U. S.* v. *Tymen*, 11 Wall., 88; *U.* "*S.* v. *Auffmordt*, 122 U. S., 197.)"

In re Carter, 97 Fed. R., 496, 498.

It is true, as a general proposition, that if the court-martial has jurisdiction to try the accused under article 62, it has also jurisdiction to determine whether or not the acts described in the specification or shown in evidence do, as matter of law, constitute a violation of that article, and that its decision on that point cannot be reviewed on *habeas corpus*. But the proposition has this limit, namely, if the facts alleged or the evidence ad-

duced shows a violation of some other specific article, then is the court-martial without jurisdiction to sentence under the 62d article, and, being without jurisdiction, the exercise of the illegal powers may be inquired into collaterally.

Doubtless the decisions in the Swaim case, 165 U. S., 553, in the Fletcher case, 148 U. S., 84, and in the Whitney case, 116 U. S., 178, will be cited as opposed to this view, but it is submitted that, when carefully considered, they in nowise militate against the position here urged.

In the Swaim case the court simply declined to examine the evidence to ascertain whether or not an offense prejudicial to good order and miltary discipline had been shown before the court-martial.

In the Fletcher case the point made was that "the "charges and specifications stated no offense whatever "within any rules and articles of war, or known to the "military law and custom of the United States." This court did, however, examine the charge and specifications sufficiently to be able to say, and did say, that the circumstances detailed in the specifications "were such "as to render the claimant amenable to the charge" of conduct unbecoming an officer and a gentleman for which he was tried.

There is no case, so far as the writer's researches have extended, holding that the court on *habeas corpus* will not inquire if the specification (or the evidence, if the evidence be before it) make out a case cognizable under some particular article and not under the general article under which such specifications is laid.

It is this point which sharply distinguishes the case at

bar from the cases last above cited. In none of them was the question presented that the allegations or the evidence made out a case cognizable under some specific article, and hence not triable under the 62nd or general article.

If the contention on the part of the Government, that the funds alleged to have been embezzled in charge 4 and its specifications were not "furnished or intended for the "military service," be true, then it follows that the court-martial was wholly without jurisdiction to try and sentence under that charge, for the offense was purely civil.

The offense charged was alleged to have been committed by an engineer officer doing duty on rivers and harbor work not connected with any military post or command, not in the presence of soldiers, performing a purely civil duty. The subject of embezzlement as contended by respondent was funds not for "the military "service." If this be the real nature of the funds, then it would be hard to imagine anything less calculated to prejudice military discipline than to embezzle such money within the meaning of Sec. 5,488.

If larceny by a soldier from a civilian, at a place away from a military post, the soldier not being in uniform, be a *civil* and not *military* offense, and, therefore, not triable by court-martial, as is conceded by the Manual, p. 16, then the statutory embezzlement, as charged in this case, of funds not intended for the military service, under the given circumstances, is civil and not a military offense; except only if it constitute conduct unbecoming an officer and a gentleman, under article 61.

The government is thus on the horns of a dilemma.

First: If its contention be sound that the duty to be performed came under the civil service branch of the government, and the moneys appropriated were for *that* branch of the service, then the misconduct alleged could in no way be to the prejudice of good order and *military discipline*, and hence not chargeable under the 62d article.

Second: If the offense be "to the prejudice of good order and *military discipline*," then it necessarily follows that the accused was performing a duty under "the military service" branch of the government, and the moneys appropriated and disbursed in the performance of such duty were for that branch of the service, and hence directly within the specific provisions of the 60th article.

If the first proposition be correct, the conclusion necessarily follows that offenses committed by officers in charge of river and harbor improvements in connection with those works are not triable or punishable under the articles of war at all, but under the civil statutes providing for the punishment of frauds against the treasury. In which case the court-martial would be entirely without jurisdiction of the offense of which the accused has been found guilty.

The jurisdiction of courts-martial is confined to the punishment of *military persons* for strictly *military offenses*. Nor can Congress confer jurisdiction upon courts-martial for the trial of *civil offenses*.

The decision in *Ex Parte Henderson* (11 Fed. Cases, 1067) was made under the act of March 2, 1863, and it was held that in so far as the act sought to make a contractor for the furnishing of military supplies to the army amenable to the jurisdiction of a court-martial it was unconstitutional and absolutely void.

What was said by the learned judge as to the jurisdiction of courts-martial is directly applicable here, and justifies a quotation at length from the opinion:

"As, then, the power of Congress is limited to mak-
"ing rules and regulations for the government of the
"land and naval forces, and of the militia in service, it
"would seem to follow that these regulations cannot ex-
"tend beyond what is necessary and proper for the gov-
"erning of these forces as such, *and in their military*
"*character*. It is doubtful whether they can be sub-
"jected to trial by court-martial for anything *except*
"*breaches of military duty*. Every soldier may be or
"is a citizen, and, it would seem, *is as much entitled to*
"*a trial by jury for any alleged crime not committed by*
"*him in violation of his duty* AS A SOLDIER *as any other*
"*person*.

"It would be difficult to maintain that a law which
"subjected to trial by court-martial for such an offense
"could be properly derived from the authority to pro-
"vide for governing the land forces, or would have any
"constitutional sanction. I find, indeed, that no law
"subjecting *a soldier* to such trial *for such an offense*,
"committed in time of peace, has ever been enacted in
"either England or America, unless the act we are now
"considering be an exception.

"The mutiny act of England and our articles of war
"are confined to the defining and the providing *for the*
"*punishment of military offenses*. The purposes of these
"acts are so clearly and so accurately stated by Lord
"Loughborough in the case of *Grant* v. *Gould*, 2 H.
"B. L., 99, that I cannot forbear quoting from his
"opinion:

"'The army being established by the authority of the
"legislature, it is an indispensable requisite of that es-

" tablishment that there should be order and discipline " kept up in it, and that the persons who compose the " army, *for all offenses in their military* capacity, should " be subjected to a trial by their officers. That has in- " duced the absolute necessity of a mutiny act accom- " panying the army. * * * The object of the mu- " tiny act, therefore, is to create a court vested with " authority to try those who are *in the army*, in all their " different description of officers and soldiers, and the " object of the law *is limited to breaches of military duty.* " Even by that extensive power granted by the legislat- " ure to his majesty to make articles of war, those " articles are to be for the better government of his " forces, *and can extend no further than they are thought* " *necessary to the regularity and due discipline of the* " *army.*

" 'When war is actually raging it is said that a muti- " neer or deserter might unquestionably be tried by a " military tribunal, according to the customary law of " war. And perhaps at that time other offenses com- " mitted by anyone in the camp and in the field may be " punished under the same law by the commander; but " the common law of England knew nothing of courts- " martial, and made no distinction in time of peace be " tween a soldier and any other subject. * * * The " English people, with their omnipotent parliament, have " ever been exceedingly jealous of granting to courts- " martial any jurisdiction over persons except those act- " ually in their army or navy. *And over them they have* " *granted jurisdiction to punish only military offenses*— " SUCH JURISDICTION ONLY AS SEEMED ESSENTIAL FOR " THEIR GOVERNMENT AS SOLDIERS OR SAILORS.' "

Ex parte Henderson, 11 Federal Cases, 1076, 1077.

The highest law office of the United States, the attorney-general, seems to entertain this view; for he has caused this petitioner and the contractors under the contracts of 1896 to be indicted in the Federal court at Savannah, Georgia, for the same offense as charged against petitioner in the court-martial proceedings. This fact is set out in this application for *habeas corpus*, and a copy of the indictment attached.

And, it is submitted that this is the proper position to take. For why are not the courts of the United States, presided over by judges learned in the law—incapable, as every lawyer who has practiced before them knows, of being swayed by prejudice—able to guide a jury of the defendant's peers to a conclusion on the facts consistent with justice, the proper tribunals for such cases? Why should not this petitioner have been accorded in the first instance that inestimable privilege of American citizens, a jury trial in such a court?

If his alleged offense be more heinous than that of the contractors because of his fiduciary capacity, it differs only in degree, not in kind, from theirs. If found guilty, a Federal judge, in his sentence, could well apportion the punishment.

As aptly said by the learned judge in the Henderson case, *supra*:

"If others may assert, I cannot, that in the civil courts "justice will not be done between the government and "the accused. If others may assert, I cannot, that courts-"martial are by their organization and mode or pro-"ceeding better fitted to administer enlightened justice "than civil courts, presided over by judges learned in "the law and aided by impartial juries; and if anyone

"assert that the law is more promptly vindicated in the "courts-martial than in civil courts, LET HIM ALSO BE "SURE THAT IT IS NOT MORE ABUSED."

Ex parte Henderson, 11 Fed. Cas., 1067, 1078.

The argument *ab inconvenienti* is not without force in this connection. It is alleged in the petition, and not traversed, that petitioner has been indicted by a Federal grand jury for the same offense set out under charge I. As the authorities now stand he cannot plead *autrefois convict*, when he shall be arraigned in the United States District Court in Georgia.

Re Esmond, 5 Mackey, 64.
U. S. v. *Cashiel*, 1 Hughes, 552.
Howe's Case, 6 Op. Atty. Genl., 506.
U. S. v. *Maney*, 61 Fed. Rep., 140.

The case last cited well illustrates the dangerous situation of petitioner.

Maney was tried before the United States Circuit Court for the Northern District of Illinois, which court, under the statute ceding jurisdiction over the Ft. Sheridan reservation by Illinois to the United States, had jurisdiction of the offense, for the murder of one Hedburg, a captain in the 15th U. S. Infantry. He was acquitted.

He was then charged with the felonious killing of the same person and tried before a general court-martial at Ft. Snelling. He pleaded former acquittal, and the plea was overruled. He then applied for a writ of prohibition in the United States Circuit Court at St. Paul; but the application was denied Maney, and the trial proceeded before the court-martial. Fortunately for him, he was

again acquitted. In the court-martial case there was no question raised as to the offense being purely military, and therefore different from the offense for which he was tried by the United States Circuit Court. It was not pretended that Hedburg was the superior officer in the meaning of the article of war (Art. 21) denouncing a penalty for striking a superior officer, nor was there any pretense of mutiny or the like.

It was a question simply of an affray between two soldiers, both amenable primarily to the jurisdiction of military tribunals, in which one killed the other in necessary self-defense.

Such a situation is abhorrent to the mind of the American lawyer; it is contrary to the genius of our institutions; and if such a principle has crept into our Anglo-Saxon jurisdiction, it is high time it should be scourged out of our temples of justice.

Loan Association v. *Topeka*, 20 Wall., 655.

I am well aware that this so-called "double amenability" theory is a favorite with military text-writers. It is supposed to find its analogy in the dual responsibility of the citizen to his state and to the United States (*Fox* v. *Ohio*, 5 How., 410; *Moore* v. *People*, 14 How., 13), than which nothing could be more far-fetched. It is not difficult to conceive that a criminal, by a single act, may offend the sovereignty of the United States and of a particular state; but how he can, by such act, doubly offend the sovereignty of either alone, in a like degree, is not nearly so clear. In the case of Maney, above cited, it was solemnly adjudicated as between him and the United States, by a court having full jurisdiction, that the fatal blow was struck in self-defense. As between the parties,

that fact became *res adjudicata*, not to be re-litigated in another court of the United States.

The question first arose in Steiner's case, 6 Op. Atty. Genl., 413, in which the alleged offense was in violation of the laws of Texas. Steiner was acquitted in the Texas State court, but was afterwards (properly enough) tried by court-martial for the same offense. The principle was unwarrantedly (as I believe) extended in Captain Howe's case; he having been, as Maney was, acquitted by the United States Court in Florida. Since then, on the assumed parallelism, the rule has been invoked in the cases in the United States courts, *supra*.

The rule of offenses against different sovereignties did not establish itself easily. In the Fox case, *supra*, Mr. Justice McLean vigorously dissented, and stated in his opinion that, in consultation before his death, Mr. Justice Story agreed with him. In the case of the Slave Amy (14 Md., 149), Mr. Chief Justice Taney, while conceding the rule in the Fox and More cases, said:

"Yet in all civilized countries it is recognized as a "fundamental principle of justice that a man ought not to "be punished twice for the same offense. And if this "party had been punished for the larceny by the state tri- "bunal, this court would have felt it to be its duty to "suspend sentence"—a principle so reluctantly admitted certainly ought not be unduly enlarged.

In McArthur on Military Law (Vol. 2, p. 300) it is said: "But it does not thence follow that every officer tried "and who may be acquitted or convicted before a civil "court of judicature is liable in all cases to be tried a "second time by a court-martial for the same offense. It "is only under peculiar circumstances of the offense be-

"ing attended with scandalous actions, or conduct de-
"rogatory to the military profession, that would render
"him liable to be tried for the same offense, even after
"acquittal or conviction by the civil court."

It is perhaps worthy of remark that the attorney-general, Cushing, based his conclusion in Steiner's case largely on McArthur, and quotes from him at length, stopping his extract, however, just before the beginning of the paragraph above set out.

McArthur suggests the true principle. If, in the given act, there is some quality which, while indifferent in the eye of the municipal law, does yet peculiarly offend some principle of the law military, then for that peculiar element—that overplus of offense, as it were—the soldier should be punished by the court-martial. To apply the principle to the present case: The alleged offense of Carter, so far as it was a fraud upon the government, was no worse, no other in kind or degree, than if any civilian disbursing officer, as, *e. g.*, an assistant treasurer of the United States, had committed a like fraud. There is, therefore, no more reason why the one should be tried by a court-martial, for the fraud *per se*, than the other. There is every reason why both should be tried in a civil court of the United States before a jury and a judge learned in the law.

But such a fraud by an army officer would certainly offend the military code at it most sensitive part. It would be conduct unbecoming an officer and a gentleman, in violation of the 61st article of war—a crime for the trial of which a court-martial is as peculiarly fit as it is peculiarly unfit to try a complicated case of fraud or conspiracy.

The logical result of all this is, I submit, that Carter should have been tried by the court-martial for a violation of Art. 61, and by the United States District Court at Savannah for the rest.

That the matter does work out so logically is surely a strong argument that the court-martial exceeded its jurisdiction it trying petitioner for the purely civil offense described in charge 4 and its specification; that so many and such serious objections can be urged against the other theory is equally an argument against its truth.

II.

THE SENTENCE IS IN VIOLATION OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Assuming that it has been demonstrated that the specification under article of war 62 was wrongly laid thereunder; and that to convict and sentence under charge 4 was beyond the powers of the court-martial, it is now insisted that by the sentence of fine, imprisonment, dismissal and degradation, Captain Carter has been more than once put in jeopardy for the same offense.

That this court in *habeas corpus* will look into the evidence when properly brought before it, to determine the identity of the offense for which petitioner claims he is being twice punished, is settled by the case of *Nielson*, 131 U. S., 176. By a parity of reasoning this court, in such proceeding, will scrutinize the pleadings to determine such alleged identity.

In the application for the writ in this case it is alleged: "That it appears from the charges and specifications "upon which said Carter was tried by said court-martial,

"and it also appears from the evidence delivered before "said court-martial, that the payment of the two checks "drawn by said Carter and described in each of the "specifications under which he was convicted are the "only basis of each of said four charges, and that the "single act of drawing said two checks has been carved "up into four distinct and different crimes and a punish- "ment assessed on each."

This allegation is not traversed by the return.

Two things must concur before the plea of twice in jeopardy can be availed of in this case.

First, that the sentence is greater than the court-martial had jurisdiction to inflict on any one of the offenses charged, taken singly; and

Second, that the offenses charged are the same, within the meaning of the constitutional provision

The first may shortly be disposed of.

The punishment must be imposed under the provisions of either the 60th or the 61st article of war or under both. Under the 61st the only penalty that can be inflicted is dismissal; under the 60th the punishment may be "fine *or* imprisonment *or* such other punishment as a "court-martial may adjudge."

That the punishment allowable under Art 60 is in the alternative and not cumulative is emphasized by the course of legislation in respect to that article.

The 60th article of war consists of sections 1 and 2 of the act of March 2, 1863, chapter 67, entitled "An "Act to prevent and punish fraud upon the government "of the United States."

By reference to that legislation we find it originally

provided that any person in the military service, if found guilty, "shall be punished by fine AND imprisonment OR "such other punishment as the court-martial may ad- "adjudge, save the punishment of death."

A person in civil life guilty of the offense, it was provided, should be punished "by imprisonment not less "than one nor more than five years OR by fine of not "less than $1,000 and not more than $5,000."

See

Act of March 2, 1863.
12 Statute at Large, pages 696–698.

By the legislation, as originally enacted, a soldier might be punished by fine AND imprisonment OR such other punishment might be adjudged, while a civilian could only be punished by fine OR imprisonment.

When the military offense was transferred to the military code the punishment was changed to conform more nearly to that allowed for a civilian. The word "AND" was stricken out and the word "OR" inserted, clearly showing the intention of Congress to confine the punishment of a soldier to fine OR imprisonment, as in the case of a civilian.

Under a precisely similar statute the Supreme Court ruled that it was error to inflict the cumulative punishment, and that the error could be reached by *habeas corpus* proceedings.

Ex parte Lange, 85 U. S., 163.

In that case the prisoner was charged with stealing and embezzling and appropriating to his own use certain mail boxes belonging to the postoffice department. Upon a trial he was found guilty of appropriating to his own use

mail boxes of the value of less than $25, the punishment of which, as provided by statute, was imprisonment for not more than one year OR a fine of not less than $10 nor more than $200

The presiding judge sentenced the prisoner to one year's imprisonment AND to pay $200 fine. The fine was paid and the prisoner was committed to jail in execution of the sentence. A *habeas corpus* writ was sued out to discharge him on the ground that the sentence was illegal, the statute authorizing only one of the punishments, and not both.

The point was held to be well taken and the prisoner was discharged.

Second. The indentity of the offenses charged.

Charge 1: Conspiracy in violation of the 60th article of war.

Specification: That the accused, a disbursing officer, did conspire, with others named, to obtain the allowance and payment of certain false and fraudulent claims against the United States, and pursuant to such conspiracy, among other things mentioned, accepted inferior materials to those specified by two contracts dated October 8, 1896, and caused to be paid out on account of such materials, $230,749.90 and $345,000, money of the United States.

Charge 2: Causing false and fraudulent claims to be paid in violation of the 60th article of war.

Specification: That the accused, a disbursing officer, did knowingly accept materials inferior to those specified in the two contracts of October 8, 1896, and did cause to be paid therefor the sums $230,749.90 and $345,000, money of the United States.

Charge 3: Conduct unbecoming an officer and a gentleman, in violation of the 61st article of war.

Specification: That the accused, a disbursing officer, did knowingly on certain false accounts, the money not being due, cause to be paid the sums of $230,749.90 and, $345,000, money of the United States.

The identity of the two checks drawn for the sums of $230,749.90 and $345,000 respectively is admitted by the pleadings.

It may be conceded that the same act may constitute two distinct offenses against the same sovereignty; or, as Judge Wallace said in his opinion in the former application for the writ of *habeas corpus* by this petitioner (*Rose* v. *Roberts*, 99 Fed. R., 948), the legislature may carve more than one offense out of a single criminal transaction; but surely, as the object of the state in punishing crime in modern times is not the wreaking of vengeance but to protect society and to reform the criminal, so the construction should not be strained to create two offenses out of a single act.

As far back as Montesquieu it was said that in "moderate governments" "a good legislator is less bent upon "punishment than preventing crimes."

Montes. Spirit of Laws, Book 4, Ch. 9.

As this is the rule in all modern ethics (see 2 Lieber, Political Ethics, Bk. 7, Ch. 2, Sec. 8), so it is the principle of enlightened jurisprudence.

In *State* v. *Cooper*, 13 N. J. Law, 361, 375, it is said:

"If in civil cases the law abhors a multiplicity of "suits, it is yet more watchful in criminal cases that the

"King shall not oppress the subject or the government "the citizen by unnecessary prosecution." This case, cited below, was on this very subject of twice in jeopardy.

"While the legislature may pronounce as many com- "binations of things as it pleases as criminal, resulting "not infrequently in a plurality of crimes in one trans- "action, or even in one act, for any of which there may "be a conviction without regard to the others, it is in "the language of COCKBURN, C. J., 'a fundamental "rule of law that out of the same facts a series of "charges shall not be preferred.'"

1 Bish. New Crim. Law, Par. 1060.
Reg. v. *Elrington*, 9 Cox. C. C., 86, 90.

Bishop, in his New Criminal Law, paragraph 1,051, suggests the following tests: "The offenses are not the "same when (1) the two indictments are so diverse as to "preclude the same evidence from maintaining both; or "when (2) the evidence to the first and that to the sec- "ond relate to different transactions; or when (3) each "indictment sets out an offense differing in all the ele- "ments from that in the other, though both relate to one "transaction—a proposition of which the exact limits "are difficult to define; or when (4) some technical vari- "ance precludes a conviction on the first indictment but "does not appear on the second.

"On the other hand (5) the offenses are the same "whenever evidence adequate to the one indictment will "equally sustain the other. Moreover, (6) if the two "indictments set out like offenses and relate to one trans- "action, yet if one contains more of criminal charge "than the other, but upon either there would be a con- "viction for what is embraced in the other, the offenses,

"though of different names, are, within our constitu-
"tional guarantee, the same."

Illustrative of No. 6 in Dr. Bishop's suggestion the following cases are cited:

In *Fox* v. *State*, 50 Ark., 528, Fox was indicted for robbing one Everidge, and was acquitted. He was then indicted for the false imprisonment of Everidge, pleaded former acquittal, alleging that the two cases were the same transaction. The court sustained a demurrer to the plea and the defendant was convicted.

The court say, by Cockrill, C. J.: "Now, an assault "is an essential ingredient in every robbery, and per-"haps in every offense of false imprisonment. False "imprisonment is classified as a species of aggravated "assault, and the circumstances of the offense charged in "this case would certainly assign it to that classification. "Under the indictment for robbery he might have been "convicted of a simple assault. * * * A verdict of "'not guilty' on the trial under the indictment for rob-"bery was an acquittal of all minor offenses charged in "the indictment; it was therefore an acquittal of the "simple assault. * * * The limitation upon the "doctrine announced by Mr. Bishop, which is made "by the case last cited, as explained in *Southworth* v. *State*, "42 Ark., 270, is that a conviction of a misdemeanor be-"fore a justice of the peace, punishable by fine only, is no "bar to a prosecution for a grade of the offense amounting "to a felony, of which the justice had no jurisdiction. "* * * The qualification does not affect this case. If "it is true, as admitted by the demurrer, that Fox was "acquitted in the Circuit Court on a former trial of the "essential ingredients of the offense now charged against "him, this prosecution cannot proceed."

In *State* v. *Cooper*, 13 N. J. Law, 361, it is said: If a man break into the house of A in the night time and steal his goods, and upon an indictment for burglarly and stealing those goods he be acquitted, it would bar a subsequent prosecution for the larceny. So, if he be indicted for the simple larceny and acquitted he cannot afterwards be convicted on an indictment for the burglary and larceny.

The court quote with approval the following passage from 1 Chitty's Crim. Law, 455: "It is not in all cases "necesary that the two charges should be precisely the same "in point of degree, for it is sufficient *if an acquittal of "the one would show that the defendant could not have "been guilty of the other.* Thus, a general acquittal of "murder is a discharge upon an indictment for man-"slaughter upon the same person, because the latter "charge was included in the former, and if it had so ap-"peared on the trial the defendant might have been con-"victed of the inferior offense; and on the other hand an "acquittal of manslaughter will preclude a future prose-"cution for murder; for, if he were innocent of the mod-"ified crime, he could not be guilty of the same fact, "with the addition of malice and design."

The other test of identity proposed by Dr. Bishop, No. 5 in the paragraph above cited, is the test to be here invoked. The following cases are cited as illustrations of how different courts have ruled on the matter:

In *United States* v. *Lea*, Fed. Cases 15,586 (4 Cranch's C. C., 486), it was held that a conviction for the offense of stealing a pocket book was a bar to a subsequent prosecution for the theft of a note which was contained in the pocket book when the latter was stolen.

In *United States* v. *Miner*, Fed. Cases 15,780 (11 Blatch., 511), it was held that an acquittal on a charge of having in possession a counterfeiting plate is a bar to prosecution for having another plate in possession at the same time—when the two plates were so connected together as that the possession of one necessarily implied the possession of the other.

In *Holt* v. *State*, 38 Ga., 187, plaintiff in error, with others, had been indicted for assault to murder committed upon one Ralston, and they were acquitted. At a later term of court another indictment was found charging plaintiff and the same persons with aggravated riot, specifying an assault with a loaded pistol upon said Ralston. They pleaded former indictment and acquittal. The state demurred, demurrer being overruled.

In the opinion of the court Warner, J., says: "If the "defendants have been legally acquitted for the same "*criminal acts* in the first indictment, though a differ- "ent name is given to the offense in the second indict- "ment, it is exceedingly difficult to conceive upon "what principle they *can be* twice tried for the same "criminal acts though *technically* it may not be for the "same offense in name. Can a state put a party upon a "trial the second time for the same *criminal act* after he "has been *acquitted* by changing the *name* of the accu- "sation? If it can, then his constitutional protection "does not amount to much. The effort here is to *evade* "the provision of the constitution by changing the name "of the *offense*." Judgment reversed.

In *State* v. *Cameron*, 50 Tenn., 78, the acquittal of a state official on an indictment charging embezzlement by falsely pretending that public money was stolen from

him during his incumbency is a bar to a subsequent prosecution for failure to turn over the same money at the expiration of his office.

In *State* v. *James*, 63 Mo., 570, defendant was indicted in two counts; one for putting "scrip" in circulation, the other for putting "notes" in circulation. The maximum punishment for either offense was $5,000 fine. The jury found a verdict of guilty as to each count, and assessed the punishment at a fine of $5,000 on each. *Held*, that as both counts referred to the same transaction, the punishment was double; and the case was reversed.

In *Wright* v. *State*, 17 Tex. App., 152, the defendant below was indicted for the theft of fifteen head of cattle belonging to one Floyd. He had been acquitted of the theft of cattle belonging to one Houston. It was insisted that both thefts were one and the same transaction, and that the plea of former acquittal should have been sustained.

The court draws a distinction between the legal results of a plea of former acquittal and one of former conviction, and then proceeds:

"But suppose the defendant had been convicted in the "first case for the theft of Houston's cattle, then on the "second for the theft of Floyd's cattle, he could plead "the former conviction, and if the evidence showed that "the transaction was but a single one, that is, that "the cattle of Houston and Floyd were taken at the "same time and place, his plea would be good and should "prevail, because the transaction being but one, the "prosecution could carve but once, and being once "carved and convicted, it could not claim another and

"second conviction against the same party for the sec-
"ond offense. In *Wilson* v. *State*, 45 Tex., 76, it was
"held that 'the stealing of different articles of property
"belonging to different persons at the same time and
"place so that the transaction is the same is but one
"offense against the state, the man cannot be con-
"victed on separate indictments charging different
"parts of one transaction as in each a distinct offense. A
"conviction on one of the indictments bars a prosecu-
"tion on the others.' "

This court has passed on the same subject in several cases, and in so exhaustive a manner as to make the preceding citations perhaps unnecessary, were it not for the importance of the principle involved, and this importance will, it is hoped, excuse somewhat lengthy quotations from the opinions of the learned justices in the cases now to be cited.

In *Ex parte Nielson*, 131 U. S., 176, petitioner had been indicted, convicted and sentenced under the Edmunds act for unlawful cohabitation. He was also indicted for adultery, the offense being laid on a date prior to the first indictment. Mr. Justice Bradley, with his usual perspicuity and force, said, in part, as follows:

"Now, the petitioner, in his plea, averred in terms
"that the unlawful cohabitation with which he was
"charged in the first indictment continued without inter-
"mission up to the time of finding that indictment, cov-
"ering the time within which the adultery was laid in
"the second indictment. He also averred that the two
"indictments were found against him upon the testimony
"of the same witness, on one oath and one examination,
"as to the alleged offense, covering the entire time speci-
"fied in both indictments. This plea was demurred to

"by the prosecution and the demurrer was sustained. "The averments of the plea, therefore, must be taken "as true. And assuming them to be true, can it be "doubted that the adultery charged in the second indict- "ment was an incident and part of the unlawful cohabita- "tion? We have no doubt of it. True, in case of "Snow, we held that it was not necessary to prove sex- "ual intercourse when making out a case of unlawful "cohabitation; that living together as man and wife was "sufficient; but this was only because proof of sexual "intercourse would have been merely cumulative evi- "dence of the fact. Living together as man and wife "is what we decided was meant by unlawful cohabitation "under statute. Of course, that includes sexual inter- "course, and this was an integral part of the adultery "charged in the second indictment, and was covered by "and included in the first indictment and conviction. "The case was the same as if the first indictment had in "terms laid the unlawful cohabitation for the whole "period preceding the finding of the indictment. The "convictionon that indictment was in law a conviction of "a crime which was continuous, extending for the whole "period, including the time when the adultery was al- "leged to have been committed. The petitioner was "sentenced and the punishment he underwent on the first "indictment was for that entire continuous crime. It "included the adultery charged. To convict and punish "him for that also was a second conviction and punish- "ment for the same offense. Whether an acquittal "would have had the same effect to bar the second in- "dictment is another question on which we express no "opinion. We are satisfied that a conviction was a "good bar, and that the court was wrong in overruling

"it. We think so because the material part of the adul-
"tery charged was comprised within the unlawful co-
"habitation of which the prisoner was already convicted,
"and for which he had suffered punishment. * * *
"Thus, in the case of *State* v. *Cooper* (13 N. J. Law,
"361), where the defendant was first indicted and con-
"victed of arson, and was afterwards indicted for the
"murder of a man burnt and killed in the fire produced
"by the arson, the Supreme Court of New Jersey
"held that the conviction of the arson was a bar to the
"indictment for murder, which was the result of the
"arson. So in *State* v. *Nutt* (28 Vermont, 598), where
"a person was covicted of being a common seller of
"liquor, it was held that he could not afterwards be
"prosecuted for a single act of selling within the same
"period. 'If,' said the court, 'the government see fit
"to go for the offense of being a common seller, and the
"respondent is adjudged guilty, it must, in a certain
"sense, be considered as a merger of all the distinct acts
"of sale up to the filing of the complaint, and the re-
"spondent can be punished but for one offense.' * * *
"The books are full of cases that bear more or less upon
"the subject we are discussing. As our object is simply
"to decide the case before us, and not to write a general
"treatise, we content ourselves, in addition to what has
"already been said, with simply announcing our conclus-
"ion, which is, that the conviction of the petitioner of
"the crime of unlawful cohabitation was a bar to his sub-
"sequent prosecution for the crime of adultery; that the
"court was without authority to give judgment and
"sentence in the latter case, and should have vacated and
"set aside the same when the petitioner applied for a

"*habeas corpus;* and that the writ should have been "granted and the petitioner discharged."

See, also,

Ex parte Snow, 120 U. S., 274.

In *U. S.* v. *Chouteau*, 102 U. S., 603, the question was whether sureties on a distiller's bond could be subjected to the penalties attached to the commission of an offense when the principal had compromised with the government for prosecution based on the same offense, designed to secure the same penalty. Mr. Justice FIELD, speaking for the court, said: "Under the authority of "an act of Congress a compromise with the government "was effected, by which a specific sum was paid by him "and received by the government 'in full satisfaction, "compromise and settlement of said indictments and "prosecutions,' which were accordingly dismissed and "abandoned. That compromise necessarily covered the "causes or grounds of the prosecution, and consequently "released the party from liability for the offenses charged "and any further punishment for them. The answer "avers that the removals of distilled spirits set forth in "the assignment of breaches of the condition of the "bond are the same removals recited in the indictments, "and that all the evidence necessary to establish the "breaches assigned would have been necessary and com-"petent under the indictment. The two proceedings, "the civil action and the criminal prosecution, so far as "they relate to offenses under section 3296, are based "upon the same transaction. * * * Admitting that "the penalty may be recovered in a civil action, as well "as by a criminal prosecution, it is still as a punishment "for the infraction of the law. The term penalty in-

"volves the idea of punishment, and its character is not "changed by the mode in which it is inflicted, whether "by a civil action or a criminal prosecution.

"The compromise pleaded must operate for the protec- "tion of the distiller against subsequent proceedings as "fully as a former conviction or acquittal. He has been "punished in the amount paid upon the settlement for "the offense with which he was charged, and that should "end the present action, according to the principle on "which a former acquittal or conviction may be invoked "to protect against a second punishment for the same "offense. To hold otherwise would be to sacrifice a great "principle to the mere form of procedure and to render "settlements with the government delusive and useless."

In *Coffey* v. *U. S.*, 116 U. S., 436, Mr. Justice BLATCHFORD referring to the case of *U. S.* v. *McKee* (4 Dill., 128), said:

"In a case before Judge Dillon (*U. S.* v. *McKee*, 4 "Dil., 128), the defendant had been convicted and pun- "ished under a section of the Revised Statutes for con- "spiring with certain distillers to defraud the United "States by unlawfully removing distilled spirits without "payment of the taxes thereon. He was afterwards "sued in a civil action to recover a penalty of double "the amount of the taxes lost by the conspiracy and "fraud. The two alleged transactions were but one, and "it was held that the suit for the penalty was barred by "the judgment of the criminal case. The decision "was put on the ground that the defendant could not be "twice punished for the same crime, and that the former "conviction and judgment were a bar to the suit for the "penalty."

It remains to apply these principles to the case at bar.

Let it be conceded for the present that the first charge and specification charge a conspiracy, which is a distinct offense from the completed fraud alleged under charges 2 and 3 and their specifications, and examine now only these latter.

The *gravamen* of the offense charged in each count is the payment by the disbursing officer of the two sums mentioned, knowing them to be based on false accounts. It is true that in charge 2 it is alleged that the falsity in the accounts was the inferiority of the materials accepted, while in charge 3 it is alleged simply that the money was not due, and hence the averments "due" and "owing" relate to the *amounts* due and not to the *time* of maturity; and the sums were not due because, by reason of the inferiority of the materials accepted, the contractors had not earned so much money as was represented by the checks in question, they being admittedly the same checks in both specifications. To paraphrase the language of Mr. Justice Bradley in the Nielson case, the material part of the fraud charged, the acceptance of inferior material, was comprised within the general allegation that the money was not due.

Or to put the matter in another way:

The gist of the offense is the payment of the two checks when they were known not to be due or owing. Let it be supposed that for a number of different reasons, represented by the symbols a, b, c, d, e, etc., they were not due. Now, will it be contended that the government could indict and punish a defendant for causing the false claims for $230,749.90 and $345,000 to be paid, alleging that they were fradulent, for the reason "a"; and thereafter again punish for causing the same two sums to be paid, alleging they were fraudulent for the

reason "b"; and thereafter for the reason "c"; and again for "d"; and so on indefinitely as long as the various reasons held out? Making the concrete application to the case at bar, it is alleged in the first specification that a conspiracy was entered into to cause a false claim to be paid by the United States to certain favored contractors. The successive steps are set out as overt acts, namely: So advertise for proposals as to favor the co-conspirators; so manage the advertising; so give out information; so receive proposals; so award the contracts, as in each case to favor such co-conspirators; then afterwards accept inferior materials from them; and finally pay the full sum specified in the contracts for such inferior materials. Now, would it be competent for the prosecution to so split up the charges as to allege in different counts each one of the foregoing reasons as making the final payments fraudulent and demand for each a separate punishment? Yet this is precisely the effect attained in the case at bar.

Treating charge 1 as a distinct offense, a sentence of fine or imprisonment or some other punishment could be imposed under article 60.

For charge 2 a fine or imprisonment or some other punishment (dismissal) was imposed by the court-martial. This exhausted its powers of punishment. But for precisely the same offense, called by a different name under charge 3, an additional punishment was inflicted, in violation of the constitution. It is immaterial how we distribute the component parts of the sentence (assuming that under the law this court may distribute); the fact remains that but two offenses were committed and three different punishments inflicted, and this under a statute which allows of but one punishment for one offense.

Two of those component parts have been suffered by petitioner, namely: dismissal and fine. The third, imprisonment, is forbidden by law; and he is, therefore, now illegally restrained of his liberty.

There is yet another aspect of this sentence. If the court was without jurisdiction to sentence under Charge IV, as I have hereinabove shown, then is the penitentiary portion of the sentence utterly void, because of the addition of the phrase "hard labor." The 60th Article provides only for imprisonment, which means at some military garrison and not at any penitentiary. The Pridgeon case (153 U. S., 48) is, therefore, not in point.

III.

THE ENTIRE SENTENCE IS ILLEGAL AND VOID BECAUSE THE PRESIDENT, HAVING DISAPPROVED THE FINDING OF CONVICTION BY THE COURT-MARTIAL AS TO CERTAIN OFFENSES, FOR THAT THERE WAS A FAILURE OF PROOF AS TO THEM, AND HAVING ORDERED THE ORIGINAL SENTENCE TO STAND, SUCH SENTENCE CEASED TO BE THE SENTENCE OF THE COURT-MARTIAL.

The court-martial found specifically a verdict of guilty as to each of the following charges and specifications:

Charge 1.

"Of the 2d specification, 'Guilty,' except the words, "'and other material,' and interpolating the word 'and' "between the words 'mattresses' and 'stone,' wherever "those words occur in the specification, of the excepted "words 'not guilty' and of the interpolated words, "'guilty.'"

"Of the charge, 'Guilty.'"

Charge 2.

"Of the 6th specification, 'Guilty,' except of the "words, 'and other material,' where they occur the sec- "ond and third time, and interpolating the word 'and' "between the words 'mattresses' and 'stone' where "they occur the second and third time; of the excepted "words, 'not guilty;' of the interpolated word, 'guilty.'

"Of the 7th specification, 'Guilty.'

"Of the 8th specification, 'Guilty.'

"Of the 9th specification, 'Guilty.'

"Of the 10th specification, 'Guilty.'

"Of the charge, 'Guilty.'

Charge 3.

"Of the 2d specification, 'Guilty.'

"Of the 3d specification, 'Guilty.'

"Of the 4th specification, 'Guilty.'

"Of the 5th specification, 'Guilty,' except of the words "'the articles have been' and of the excepted words "'not guilty.'

"Of the 6th specification, 'Guilty.'

"Of the 7th specification, 'Guilty.'

"Of the 9th specification, 'Guilty.'

"Of the 11th specification, 'Guilty.'

"Of the 22d specification, 'Guilty.'

"Of the charge, 'Guilty.'

Charge 4.

"Of the 1st specification, 'Guilty.'

"Of the charge, 'Guilty.'"

Making sixteen specifications under four charges.

These specifications embraced the following alleged offenses:

1. Knowingly making and causing to be paid a fraudulent pay roll for $29.50.

2. Knowingly causing to be paid a certain fraudulent voucher for $121.60 for certain guide piling, on January 12, 1897.

3. Knowingly causing to be paid a certain fraudulent voucher for $384 for guide piling, on March 10, 1897.

4. Knowingly causing to be paid a certain other fraudulent voucher for $108.80 for guide piling, on July 19, 1897.

5. Knowingly making a false statement to the chief of engineers with respect to certain new soundings in Savannah Harbor.

6. Knowingly making a false statement to the chief of engineers as to certain alleged excessive claims for damages by riparian owners on Savannah river.

7. Converting $132.10 to his own use, the same being the money of one Alfred Hirt.

8. Deceiving the chief of engineers as to his whereabouts March 2, 1897.

9. Conspiring to defraud the United States out of $230,749.90 and $345,000.

10. Causing two fraudulent checks for $230,749.90 and $345,000, respectively, to be paid to the Atlantic Contracting Company. (This last offense is specified under each of charges 2, 3 and 4.)

Thus the defendant was convicted by the court-martial of nine, or perhaps ten, separate and distinct offenses, growing out of wholly distinct and separate transactions, and for the most part not of the same class or category of crimes. Several of them are purely military offenses,

the ones charging deception of the chief of engineers; but others, one, two, three, four, nine and ten, as above numbered, are each of them civil offenses as well.

The court-martial assessed a lumping sentence for all the different offenses embraced in the sixteen specifications. The Attorney-General, in his opinion to the President, recommended that the verdict of the court-martial be set aside as to the first eight offenses (twelve specifications), because the findings were not supported by the evidence. The President adopted the recommendation, disapproved the findings indicated, and approved them as to one specification under each charge (the two fraudulent checks above named), BUT LEFT THE ORIGINAL SENTENCE OF THE COURT-MARTIAL TO STAND UNALTERED.

It is submitted that the entire sentence is void.

It at once became no longer the judgment of the court-martial, and it should have been referred back to that body to get its sense as to the *quantum* of punishment, which, in its opinion, should have been meted out to the accused for the single offense of which he was finally, lawfully, adjudged guilty.

In Winthrop on Military Law (2d Ed.), at page 695 *et seq.*, is to be found a discussion of the grounds upon which the reviewing authority should refer the proceedings of a court-martial back to that body for revision, and among those given are "for errors of law or fact," "or of judgment or discretion," and speaking under that head the author says: "Such are mainly errors in the "substance of the findings or sentence, as that the find-"ings, or some of them, are not warranted by the evi-"dence." *Ibid.*, 696. In the present case the only proper mode of procedure was to send the case back to

the court-martial, with the improper findings eliminated, with the direction to the court to reconsider its sentence, and assess such punishment against the prisoner as the findings approved by the reviewing authority should, in the discretion of that court, warrant.

The objection to this procedure, urged below, that the members of the court-martial were widely scattered, should have no weight, because, first, if it be the law that the sentence should be re-committed to them, the *inconvenience* cuts no figure; and, second, five of the original thirteen members would have sufficed to reaffirm or modify the original sentence.

Manual for Courts-Martial, page 10, Par. 6.

To allow the original sentence to stand after overturning the great majority of the finding was a clear invasion by the reviewing authority of the exclusive province of the court-martial. It was, in effect, *to increase*, by executive order, the punishment awarded by the court.

It will be contended, doubtless, that, admitting the twelve counts to be bad, or unsupported by the evidence, and therefore not capable of supporting any sentence, there yet remains a count, viz: charge 4 and its specification, the punishment for which is discretionary, and which is adequate to sustain the entire sentence awarded; and that therefore under the common law rule and the rule announced by this court, the judgment will not be disturbed.

Pretermitting, for the present, the answer that the count on the 62d article of war is bad, as shown elsewhere in this brief, and itself not capable of supporting any sentence; and passing, also, for the present, the further answer that, inasmuch as all of the rejected twelve speci-

fications manifestly belong under specific articles of war other than the 62d, and hence cannot be charged or punished under that article, it is insisted that the rule above referred to can have no application to this case, because its reason here fails, and hence its application also fails.

Formerly the rule of the common law was that a general judgment for the crown, on an indictment containing several counts, one of which was bad, cannot be reversed on error if there remain one good count capable of supporting the sentence. The rule was based on the presumption that, even though the jury should convict on a bad count, the *nisi prius* judge (or King's Bench), in imposing sentence, considered only the good count and graded the punishment accordingly. This rule was strongly assailed in the great case of *O'Connell et al.* v. *The Queen*, 11 Cl. & F., 155.

The judges of England, having been called to the bar of the House, delivered their opinions on the point, and a majority, composed of Tindal, Ch. J.; Patterson, Maule, Williams and Coleridge, J. J.; and Barons Gurney and Alderson, were for affirming the rule, while Mr. Justice Coltman and Baron Parke were opposed.

In the House the vote stood that such a judgment was bad. Lords Cottenham, Campbell and Denman opposing the judgment; the Lord Chancellor (Lindhurst) and Lord Brougham affirming its validity. The fact that the great majority of the judges held the judgment to be good, while the vote of the law lords stood three to two in overruling them, has much impaired the force of the decision in this country. Moreover, a strong political reason no doubt had its influence with the law lords.

The case is very valuable, however, because of the elaborate arguments by learned lawyers, and because, in the 271 pages of the report, everything that can be said for or against the rule is to be found.

It should be remarked that the rule is highly technical, and rests solely on a presumption of law, which, admittedly, in many cases, may be directly opposed to the fact. Baron Alderson confesses that there are objections to the rule. "I am not insensible (says he, at "page 287) that some of the difficulties stated are real; "and if the rule of the criminal law applicable to such "cases must of necessity be a perfect rule. * * * "the argument is well founded. * * * My answer "to them all is this, the law proposes not a perfect rule, "but being human, and therefore imperfect, must choose "between conflicting inconveniences; and I think, in the "rule which it has adopted, it has chosen the least."

The limits of the rule and its reason are thus laid down by Ch. J. Tindal, after stating that anciently there was but one count allowed in an indictment for a felony, but latterly the practice had grown up of alleging the same offense in varying counts to meet the possible proof.

"In no case, however, was it ever known in practice "that the two counts of the indictment contained two "different charges of felonious cuttings and woundings: "but one *corpus delicti* only, under two different de- "scriptions. And if the prosecutor in any charge of "felony should offer evidence tending to prove two dis- "tinct charges of felony, he would be stopped imme- "diately by the presiding judge, and directed to make "his election upon which single charge of felony he in- "tended to proceed. Now, suppose, in the case last put

" of the two counts for the same offense, a general ver-
" dict of guilty, a sentence of imprisonment, with hard
" labor for twelve calendar months (which is a discre-
" tionary punishment), and after the sentence passed, it
" should be discovered that one of the counts in the in-
" dictment was defective, in consequence of the omission
" of some necessary averment, and a writ of error should
" be brought, it would surely be against all principle
" both of law and reason (for as to any decision in sup-
" port of such a doctrine none can be found) that the
" judgment should be reversed and the party who had
" been convicted on the indictment discharged from all
" punishment for his offense.

" It must, indeed, be conceded that the practice in the
" case of a prosecution for a misdemeanor so far differs
" from that in a prosecution for felony, that there may be
" (though it is not usually the case) several counts for
" distinct offenses contained in one and the same indict-
" ment. In that case the prosecutor is not always put
" to his election as in the case of felony; but the trial
" may proceed and the sentence may be passed for sev-
" eral offenses distinct from each other. But the conse-
" quences, so far as relate to the present subject of
" inquiry, appear to be the same, both in the charge for
" felony and the charge for misdemeanor. The moment
" the discretionary punishment is pronounced by the
" judge, whether it be upon a single offense described
" differently in various counts of the indictment, or for
" divers and distinct misdemeanors charged in different
" counts, that discretionary punishment, so awarded by
" the judge, stands in the place of the fixed punishment
" in the case of the felony. And the court of error has
" no more right to presume or to intend that any part

"of the discretionary punishment in the case of misde-
"meanor has been awarded in respect of an insufficient
"count, than in the case of felony to presume that the
"fixed punishment has been given upon a defective
"count where there is a valid count to support it."

The United States courts have followed the rule contended for by the majority of the judges of England, and this Court in several cases has announced the same principle.

A typical decision is that of *Claassen* v. *U. S.*, 142 U. S., 140.

In that case there were some forty counts in an indictment charging the defendant with embezzling the securities of a national bank of which he was the president. The district attorney elected to go to the jury upon eleven of the counts. The jury acquitted the defendant of six counts and found him guilty specifically of each of the remaining five. The defendant was sentenced by the trial judge to a term of six years in the penitentiary—the punishment prescribed by the statute under either count being not less than five or more than ten years.

Mr. Justice Gray delivered the opinion of the court; held the first count good; and without going into the remaining counts, stated the rule to be that on a conviction on several counts in an indictment, and a sentence which did not exceed that which might be given on any one count, if any count were good on error, the court would not reverse.

The learned justice stated the principle to be that in the *absence of anything in the record to show the contrary, the presumption of law is that the court awarded sentence on the good count only.*

The rule has been very generally adopted also by the states in our Union; but it is to be noted that in all jurisdictions where followed, the law or the practice is for the jury to find the guilt and for *the court to impose the punishment;* or else the jury finds a general verdict of guilty, under the instructions of the court, and assesses the punishment. In the former class, the presumption is, as above stated, that the court awards sentence on the good count only; in the latter, that the jury in its general verdict ignored the bad counts. This latter proposition is, however, not well supported by the authorities.

But a diligent search has failed to discover a single case in which, the jury having found a several verdict of guilty on good and bad counts alike, and having assessed either a several or a collective sentence on all, the sentence has been upheld on appeal or error. It is believed no such case exists. On the contrary, in jurisdictions where such practice obtains, under the given conditions, the judgment has been reversed. This is as it should be on principle; since the presumption spoken of in the Claassen case, *supra*, cannot be indulged, for the very obvious reason that it would be contrary to the fact shown by the record, and *cessante ratione legis, cessat ipsa lex.*

In the case at bar, the record affirmatively shows Captain Carter to have been severally found guilty on each of sixteen specifications and on each of four charges. It shows affirmatively that the court-martial awarded a lumping punishment of fine, imprisonment, dismissal and degradation. Can it be presumed that, having found him guilty severally on each of sixteen counts, the court-martial sentenced him only on four? That would be to say, that the military tribunal specifically found him guilty of having committed each one of ten crimes, and

then (without pointing out which ones) sentenced him only for two; surely there is no other instance, in our law of the present day, in which a legal fiction is permitted to falsify a plain record.

In Missouri where, in all crimes save murder in the first degree, the jury assesses the punishment, one Dooley was convicted on an indictment charging, in two counts, burglary and larceny, and the jury assessed the punishment on the burglary count at three years, and on the larceny count at two years in the penitentiary. On appeal the Supreme Court held the larceny count was bad and that the burglary count would not sustain the judgment, though the maximum punishment for burglary exceeded five years.

State v. *Dooley*, 64 Mo., 146.

In *Wood* v. *The People*, 59 N. Y., 117, the plaintiff in error was indicted in five counts for perjury. There was a general verdict of guilty. As to numerous assignments of perjury in the various counts, there was no evidence to show the materiality of the alleged perjury testimony to the issues in the original case.

The Court of Appeals of New York held the general verdict bad, and reversed the case.

Say the court, on page 122:

"If, therefore, there was a failure to show, in respect "to any one of the assignments of perjury, that the "matter embraced therein was material, the conviction "must be reversed; otherwise, as the court cannot know "upon what ground the jury proceeded, the defendant "may have been convicted upon an assignment of perjury "which related to testimony not material to the case. "We have been referred to cases which hold that judg-

"ment will not be arrested upon a conviction for perjury "where the indictment contains in one count several as- "signments, some of which are good and others defect- "ive. (*People* v. *Curling*, 1 J. R., 320; *Same* v. *Has-* "*call*, 6 N. H., 452.) It will be presumed, in such a "case, that the jury disregarded the defective assign- "ments and proceeded upon the substantial and sufficient "averments in the indictment. But when the attention "of the court on the trial is specifically called to the "question and the judge refuses to withdraw from the "consideration of the jury those assignments which are "defective in form, or which have not been sustained by "proof, and exception is taken, the court cannot disre- "gard the error."

The reasoning in this last opinion is directly applicable to the case at bar. How could the President know upon which specification the court-martial based its sentence? Capt. Carter was found guilty under the 61st article of war of making false reports intending to deceive his chief (specifications 9 and 22, charge 3). Who can say that he was not cashiered for conduct unbecoming an officer and a gentleman for those offenses? Yet the President declared he was not guilty of them.

See,

Op. Atty. Genl., Sept. 29, 1899.

He was found guilty, under charge 2, of specifications 8, 9 and 10, for allowing fraudulent accounts for guide piling in favor of the contractors, and as to these the President held him innocent; yet the court-martial may have assessed the fine of $5,000 for those very offenses of which they pronounced him "guilty." Or, may not the court-martial have considered that, being guilty of these

last offenses, and also of the crime of certifying a false pay-roll (Spec. 7, Ch. 2), he merited one year in the penitentiary? Yet, of all these the president said he was not guilty.

Consider now the case from the standpoint of humane and enlightened jurisprudence. Here was the defendant, an army officer, who had been in charge of great engineering works, suddenly brought to trial before a court of brother officers charged with thirty-seven different specified offenses and crimes, ranging from false statements intended to deceive his chief and the Secretary of War, through perjury, false pay-rolls and fraudulent claims, to embezzlement; running back, some of them, six years; all of them involving such a degree of moral turpitude certainly, as, in their bare recital, to arouse the indignation of the members of the court-martial. Nor was this feeling at all diminished by the plea of limitations interposed as to seventeen of these offenses, barred by their very affirmative allegations. Can this court infer nothing from the presence of these seventeen charges, preferred in violation of the 103d article of war?

The record shows that the trial lasted four months. The first charge was conspiracy. Is this court precluded from an examination of petitioner's exhibit "A" that it may not see how these four months were employed by the prosecution in an effort to show conspiracy? How the accused's private papers were seized and put in evidence against him in spite of the decision of this court in *Boyd* v. *U. S.*, 116 U. S., 616? How the defendant's whole life from 1885 was ransacked? These are unfortunately only "irregularities" not reviewable in this proceeding. But this court can see from the record that of thirty-seven alleged offenses, thirty-three were either

barred or there was no sufficient evidence on them to sustain a verdict of guilty. This court can also read in the record that twelve of the guilty findings were set aside by the President. And if the court may not look into the evidence to see what testimony was let in by the court to sustain these findings, it may yet infer that there must have been some testimony adduced in their support.

In Bishop on Crim. Pro., Par. 1015, it is said:

"If one of several counts is bad the court has no right "to receive evidence upon it against the objection of the "defendant. Properly it ought to be quashed, but if "it is not, and the court refuses to exclude evidence ap- "plicable only to it and to direct the jury not to base any "finding upon it, a general verdict of guilty on the in- "dictment should be set aside."

In *State* v. *Hinckley*, 4 Minn., 345, defendant was indicted for the larceny of certain bank notes and also of certain gold coin. It is not clear from the report whether the indictment was in two counts, or both offenses laid in one count. There was a general verdict of guilty. It appeared that one portion was fatally defective, but that evidence tending to support it was received over defendant's objection.

In reversing the judgment the Supreme Court say, at p. 363: "And even had it appeared that evidence was "introduced to sustain that part of the charge well laid "in the indictment, it would be impossible for the court "to say whether the jury would have found their verdict "upon that alone, without also considering the improper "evidence."

In Wharton on Crim. P. & P., Par. 771, it is stated: "On the other hand, there are cases in which no such

"presumption can be made (the presumption that the "verdict of the jury attached only to the good counts, "and that the prosecution had withdrawn the bad). "Suppose that the bad count is for an offense substan- "tially different from the good count. Suppose that "evidence calculated to influence the jury on the good "count, but inadmissible under that count, was admitted "under the bad count. In such case, after a general "verdict of guilty, there should be a new trial, or after "a judgment on such verdict there should be a reversal; "the reason for such action being that the result was "reached by the introduction of a wrongful element."

Here was surely the "introduction of a wrongful element," of which Dr. Wharton speaks in the above quotation; here were the bad counts on which evidence was received, and which according to Dr. Bishop should cause the verdict to be set aside. In court-martial proceedings there is no such thing as a motion for a new trial, a motion in arrest, a request for instructions, or the saving of exceptions. The President has acted as the appellate court, and he has pronounced twelve of the counts bad, not supported by the evidence.

"Suppose that evidence calculated to influence the jury "on the good count, but inadmissible under that count, "was admitted under the bad count." What then? According to Dr. Wharton, after judgment, a reversal. No presumption that the jury assessed the punishment on the good count only, nor even that the court pronounced sentence disregarding the bad counts. Suppose the court-martial permitted evidence to show the defendant had knowingly made a certain false voucher in favor of the Atlantic Contracting Company for certain guide piling in January, 1897, and another in March, and

another in July (Charge 2, Spn's. 8, 9 and 10), and suppose this very Atlantic Contracting Company was alleged to be the corporation for the benefit of which the defendant was charged (Charge 1, Spec. 2) to have previously conspired and in the execution of the same contracts, to defraud the government. Who can say that the conviction on the conspiracy charge was not "reached "by the introduction of a wrongful element?"

To sum up the argument. As the matter stands the court-martial found the accused severally guilty on each of sixteen counts, charging ten distinct and dissimilar offenses, some of them punishable by a fixed punishment (dismissal), some by punishment fixed within limits (fine or imprisonment or such other punishment as the court-martial might see fit, and some by a purely discretionary punishment short of death. The court-martial imposed a lumping punishment for all of these offenses. The President disapproved the finding of the court as to twelve counts, charging eight distinct offenses, and allowed the original sentence to stand. The sentence became at once no longer the sentence of the court-martial, for no presumption can be indulged that it imposed the entire punishment on the four counts allowed to stand, because the record speaks to the contrary. Hence the President by his action invaded the province of the court-martial and increased the amount of the sentence. The sentence therefore is void.

It is void in another aspect. Some of the counts set aside were closely allied to the conspiracy count under charge 1; evidence under such counts would strongly tend to influence the court-martial in deliberating on the conspiracy charge; but such evidence became no longer admissible after its proper count was set aside. Thus a

wrongful element was introduced into the case adverse to the defendant, and the punishment no longer represents the judgment of the court-martial, the tribunal to which alone belongs the power of fixing the punishment.

To illustrate the argument. The nearest analogue to a court-martial in our municipal law is the trial court and jury in criminal libel cases, in those jurisdictions where the jury is by statute made the judge of the law and the fact and also fixes the punishment; as, *e. g.*, in Missouri and Illinois. The court-martial corresponds more or less closely to the jury in such cases, and the reviewing authority to the judge. The sentence of the jury has no validity until embodied in the judgment by the court; so the sentence of the court-martial is inchoate until approved by the reviewing authority. The judge, like the reviewing authority, has the power to set aside the verdict in whole or in part, but no power in either case to increase the punishment. The analogy is not perfect, and I am aware that "an illustration is no argument," but perhaps the comparison will serve to clear up the understanding in this matter, which is without precedent. In the parallel case assumed, suppose there were an indictment for criminal libel in two counts, charging separate and unconnected libels, and the jury should find the defendant severally guilty of each count and impose a sentence on each of six months in jail—the maximum for libel being one year. Would the trial judge refuse to arrest the judgment if one of the counts were fatally defective? Would an appellate court fail to reverse in such a case?

This is the Missouri case, *State* v. *Dooly*, *supra*, and there the court held the judgment bad.

Would the rule change if the jury, having found a

several verdict of guilty, had imposed a lumping sentence for both counts?

In neither event, it is submitted, could an appellate court say that the jury disregarded the bad count, for the record affirmatively shows the contrary.

CONCEDING, FOR THE SAKE OF ARGUMENT, THAT THE RULE IN THE UNITED STATES COURTS OBTAINS IN COURTS-MARTIAL, STILL THIS SENTENCE CANNOT BE UPHELD UNDER CHARGE 4.

But it is submitted that the learned judges of the Circuit Court were in error in the assumption that the sentence could lawfully be sustained under the fourth charge.

It is shown elsewhere in this brief that the specification under the fourth charge was wrongly laid under the 62nd article of war; and since as to all the other specifications laid under other articles the court-martial failed to find that any of them did not charge, or the proof did not sustain, a violation of the specific articles under which they were laid, but did show a violation of the 62nd article (as the court might lawfully have done, Manual, p. 48, Sec. 4), it follows that the fourth charge goes out of the case, and the sentence must stand or fall under the other charges. Whether or not it can stand under charges 1, 2 and 3 is discussed as a constitutional question elsewhere.

There is yet a further objection to the assumption that the 4th charge can be utilized to support this sentence.

It is shown elsewhere in this argument that the rule of military law requires all offenses to be laid under the specific article to which they belong, and that it is error

to lay an offense under the 62nd article if it properly belong under some other, as, *e. g.*, while desertion is certainly "to the prejudice *of good order and military* "discipline," the offense cannot be charged under article 62, but must be laid under article 38.

Manual, p. 15, Sec. 3.

Now, the offenses of which the President declared Captain Carter innocent, but as to which the court-martial found him severally guilty, some were charged under article 69 and some under article 61. Some in their statement involved that kind of moral turpitude for which the 100th article requires the peculiar punishment of degradation, which cannot lawfully be inflicted under article 62, as elsewhere shown; and some are punishable peremptorily by dismissal. If, then, it be assumed that the court-martial affixed to these disapproved findings of guilty on these particular counts any portion whatever of the lumping sentence (and to presume otherwise would be to assert that their findings of guilty were meaningless and absurd), it necessarily follows that such portion of the sentence cannot find its support under charge 4, which is a violation of article 62. In other words, to say that such portion of the sentence is supported by charge 4 is to do what the law military expressly forbids.

The result is that in no aspect can the sentence as approved be viewed as the sentence of the court-martial. It is a different sentence from that imposed; and since its difference does not consist in remission or in mitigation, it must consist in an increase. There seems to be no logical escape from this result.

If it be an increase, it is void *in toto*.

IV.

THE PUNISHMENT BY FINE AND IMPRISONMENT WERE, EACH OF THEM, ILLEGAL AND VOID, BECAUSE INFLICTED AFTER CAPTAIN CARTER HAD CEASED TO BE AN OFFICER OF THE ARMY AND HAD PASSED BEYOND THE JURISDICTION OF A COURT-MARTIAL.

By command of Major General Miles, by direction of the Secretary of War, Captain Carter ceased to be an officer of the army on the 29th day of September, 1899.

The order is:

"By direction of the Secretary of War, Captain "Oberlin M. Carter, Corps of Engineers, ceases to be "an officer of the army *from this date*, and the United "States Penitentiary, Fort Leavenworth, Kansas, is des- "ignated as the place for his confinement, where he will "be sent by the Commanding General Department of "the East under proper guard.

"By command of Major General Miles.

H. C. CORBIN,
Adjutant General."

Hence, Captain Carter, as an officer in the military service, ceased to exist on that date.

Having ceased to be in the military service, he is no longer amenable to military jurisdiction.

Colonel Winthrop, in his Military Law, says:

"It is the general rule that a person is amenable to "military jurisdiction only during the period of his "service as an officer or soldier. Thus, in the case of "an officer, the jurisdiction commences with the accept- "ance of his appointment or commission, or where

"originally appointed by state authority with his muster "(or reappointment) into the service of the United "States, and ends with his death, the acceptance of his "resignation, his dismissal, etc. Or, if a volunteer "officer, his discharge, his dismissal, or muster out, "etc."

1 Winthrop, Mil. Law, page 116 (2d Ed.).

The author then states the amenability of an officer to the military jurisdiction ceases even during absence on leave.

1 Winthrop, Military Law, pages 120–121 (2d Ed.).

When a person enters the military service he becomes a member of a class separate and distinct from persons in civil life. His official relation invests him with what might be termed an artificial person distinct from his natural person. He becomes a legal entity, subject in general to a different jurisdiction and deprived of valuable rights accorded to persons in civil life. His official relation, as Colonel Winthrop says, begins with his commission and ends with his discharge. He is as much a creature of that relation as a corporation organized under statute law. Dismissal from that relation is official death, the same as the revocation of a charter of the corporation or its dissolution is corporate death. All actions of every kind and nature *abate*, and the court loses jurisdiction either to try, sentence or punish.

While in the military service the accused was entitled to the benefits and advantages of that relation and likewise subject to its pains and penalties.

By the termination of that relation he no longer has

the right to its benefits and advantages. He is likewise relieved of its pains and penalties.

The accused must either be a citizen or a person in the military service. He cannot be a civilian for one purpose and a member of the army for another purpose.

It will not do, therefore, to say that as the court-martial had jurisdiction at the time of the trial, the military authorities now have jurisdiction to deprive the accused of his liberty under the sentence imposed.

To hold that he is further subject to military custody or discipline would be, as observed by Colonel Winthrop, to create a third class—neither civil nor military—a class not provided for by the constitution nor recognized in the law.

It was certainly within the power of the court-martial to make the sentence of dismissal to take effect upon the expiration of the term of his imprisonment, but this it did not do. Prior to being imprisoned he was dismissed from the service and his official relation terminated.

The single question is, what is now the status of the prisoner? Is he a person in the military service or is he a civilian? He is no longer entitled to wear the uniform of his rank, nor is he now in the pay of the military establishment. No pardon or executive clemency of any kind can reinstate him as a military officer. If he is not an officer in the military service, then he is a civilian and no longer amenable to military custody for any purpose whatsoever, either trial, sentence or punishment.

The above contention is wholly in accord with the views of Attorney-General Wirt, who, on the 16th of May, 1821, gave it as his opinion that military punishment could not be continued after the 1st of June, 1821,

as to those who did not then constitute a part of the peace establishment under the act of March 21, 1821.

The attorney-general, in his opinion, says:

"I have considered the question submitted to me on "the 14th and am of the opinion that, from and after the "1st day of June next, when the act of the 2d of March "last takes effect, military punishment cannot be in- "flicted or its infliction continued on any who do "not constitute a part of the peace establishment under "that act, since by the twelfth section of the act all be- "yond this number are expressly and, without exception, "required to be discharged from the service of the "United States. Those who are not soldiers on that "day must be citizens, and in the latter character cannot "be subject to military law—at least for the completion "of a punishment which, in its character, looks to their "restoration to the military service, when the punish- "ment shall be over as sentences to confinement, hard "labor, etc. There is color for the opposite opinion, "but I hold this to be the safest and soundest on the law "as it stands."

5 Opinions Attorney-General, p. 735.

See, also,

The Opinion of Attorney-General Cushing, rendered January 20, 1857, 8 Opinions of Attorney-General, p. 328.

Ex parte Henderson, 11 Federal Cases, p. 1067.

There is no authoritative decision to the contrary.

It is true it has been held that the expiration of the term of enlistment of an enlisted man would not prevent the trial and the punishment of an offense after the term of enlistment had expired.

In re William Bird, 3 Fed. Cases, p. 425.
In re Walker, Am. Jurist, Vol. 3, p. 281.
In re Bogart, 8 Fed. Cases, 796.
Barrett v. *Hopkins*, 7 Fed. Rep., 302.

The case of an enlisted man whose term of enlistment had expired, *but who has not received his discharge from the military service*, is entirely different from the dismissal of an officer which, *ipso facto*, terminates his relation to the service.

What has been said by the judges in those cases affecting the question now under consideration is purely *obiter*, and much of their reasoning is on entirely untenable grounds. For instance, in *Barrett* v. *Hopkins*, *supra*, the learned judge reasoned that as the offense was committed while the accused was in the service, no change in his status could oust the jurisdiction of the military authorities to try and punish him for that offense under the general rule of law that when a court once acquires jurisdiction it retains jurisdiction for all subsequent purposes.

That rule, it is submitted, has absolutely no application.

By dismissal from the service, all proceedings against a dismissed officer ABATE in the same manner as an action against a natural person dying *pendente lite*, or against a corporation whose corporate existence is cut off by its dissolution.

As said by Mr. Justice FIELD: "With the forfeiture "of its rights, privileges and franchises, the corpora- "tion was necessarily dissolved, as the decree adjudged. "Its existence as a legal entity was thereupon ended. It "was then a defunct institution, and judgment could be

"no more rendered against it in the suit previously com-
"menced than judgment could be rendered against a
"dead man dying *pendente lite*. * * * The prolong-
"ation of the corporate life for this specific purpose as
"much requires special legislative enactment as does the
"creation of the corporation."

First National Bank v. *Colby*, 88 U. S., 609.

"That a petition for a writ of mandamus to a public
"officer of the United States abates by his resignation of
"his office has been determined by a series of uniform
"decisions of the Supreme Court, and has for years been
"considered as so well settled that in many of the cases
"no opinion has been filed and no official report pub-
"lished."

Warner Valley Stock Co. v. *Smith*, 165 U. S., 28.
U. S. v. *Boutwell*, 84 U. S., 604.

The same rule of law applies here.

A reference to the legislation by Congress in relation to dismissed officers clearly shows that the views here contended for are of such force as, in the opinion of Congress, to make necessary a special statutory enactment, that dismissal or discharge from the service shall not abate the proceeding, but that the officer so dismissed or the soldier so discharged shall continue to be liable to be arrested and held for trial and sentence by a court-martial for an offense provided for in the 60th article of war in the same manner and to the same extent as if he had not received his discharge nor been dismissed.

See

60th Article of War.

Colonel Winthrop, in his Military Law, expresses the opinion that that clause is clearly unconstitutional, because it subjects civilians to trial by court-martial.

See

Winthrop's Military Law, pp. 122–123.

The reasons given for his views are that the statute "must be regarded as retaining these persons, notwithstanding that they have become civilians, in the army, "for a temporary or special purpose," and that authority to govern cannot be extended to the discipline of soldiers, "after they have been legally separated from the army;" that the constitution "recognizes no third class which is "part civil and part military—military for a particular "purpose or in a particular situation, and civil for all "other purposes and in all other situations;" and that Congress cannot create such a class without "disregard "of the letter and spirit of the organic law."

I Winthrop's Military Law, pages 144–145 (2d Ed.).

The opinion of Colonel Winthrop as to the unconstitutionality of the statutes referred to is undoubtedly well founded.

In the Henderson case (*supra*) the statute subjecting contractors with the army to the jurisdiction of courts-martial was expressly held unconstitutional.

Ex parte Henderson, 11 Federal Cases, p. 1067.

If those statues are unconstitutional, then *a fortiori* is the detention and restraint of an officer dismissed from the service unauthorized and illegal.

If, as claimed by the government, the offense is prop-

erly chargeable under the 62d article, then there is no statute whatsoever authorizing trial, sentence or restraint after an officer has been dismissed from the service.

The statute applies only to offenses under the 60th article of war; and the fact that Art. 60 specially provides for trial and sentence after discharge or dismissal, shows that Congress did not intend or contemplate that the terms of Art. 62 should cover the case of an officer after dismissal.

Nor can it be said that in suffering the punishment of imprisonment the accused is not in the custody of the military authorities. He is now in the actual custody of the warden of the United States penitentiary and is held by him under and by virtue of the sentence of the court-martial.

If that sentence be void or irregular, or the court-martial has lost its jurisdiction by the *abatement of* the proceedings, it furnishes no authority for his detention.

It may be contended that the practice of dismissing an officer from the service and imprisoning him after such dismissal is sanctioned by the "laws and usages of "war."

As to such a contention it need only be said that the "law and usages of war" cannot overrule or override constitutional provisions.

As said in the Milligan case:

"It can serve no useful purpose to inquire what those "laws and usages are, whence they originated, where "found and on whom they operate; they can never be "applied to citizens in states which have upheld the au-"thority of the government and where the courts are "open and their process unobstructed."

In the case at bar, the prisoner having been dismissed from the military service, his punishment can have no relation to the good order and discipline of the military service. And under the grant of power to Congress "to "govern the land and naval forces" there is no authority to continue military punishment upon a person in civil life.

Since the decision in the Milligan case (71 U. S., 1), it would hardly be contended that a person in civil life could be held a prisoner by virtue of a sentence imposed by a court-martial.

V.

THE SENTENCE OF THE COURT IS BEYOND ITS POWERS AND ILLEGAL AND VOID, BECAUSE THE PUNISHMENT ASSESSED THEREIN EXCEEDED THE MAXIMUM PUNISHMENT FIXED BY THE PRESIDENT OF THE UNITED STATES IN ACCORDANCE WITH THE LAW.

It is alleged in the petition in this case that by the act of Congress approved September 27, 1890, the President is authorized to fix by general order the limits of punishment for certain offenses by courts martial.

It is further alleged that pursuant to that authority the president, by an order dated March 20, 1895, fixed the maximum punishment for a violation by an enlisted man in the army of the United States of the 60th article of war, and for a violation by such person of the 62nd article of war by embezzlement of more than $100, at a term of four years' confinement at hard labor, under either article; and thereafter, on October 31, 1895; the president of the United States, in accordance with the terms of said acts of Congress, prescribed that the said maximum

limit should extend to all such violations, whether by officers or enlisted men of the army. Said last-named order is found in the army regulations promulgated by the order of the president, on October 31, 1895 (*supra*), as follows:

"Art. 938. Whenever, by any of the articles of war, "punishment is left to the discretion of the court it shall "not, in time of peace, be in excess of a limit which the "president may prescribe. The limits so prescribed are "set forth in the Manual of Courts-Martial published by "authority of the Secretary of War."

Petitioner further averred that the limits above set out are prescribed in said manual and were in full force and effect when the court-martial passed its sentence of five years' imprisonment on said Carter.

These allegations are not traversed in the record.

A comparison of dates shown by the record will also disclose that when the alleged offenses were committed said prescribed limits were in full force.

It was urged below and will doubtless be pressed in this court that the limits above mentioned are applicable only to enlisted men; but no such limitation appears in the orders, and it is submitted cannot be read into them by judicial construction.

The act of Congress allows the President to prescribe limits, in certain cases, to all punishments by courts martial; the purpose undoubtedly being to secure uniformity of sentences. Under that authority, the President caused to be published (March 20, 1895) an order fixing such limits, but restricting them in their application to enlisted men only. Later, the same authority (the President) caused certain army regulations to be promulgated

(October 31, 1895), in which, without regard to rank, the limits are made of universal application in all cases where the articles of war leave the *quantum* of punishment to the discretion of the military tribunals.

It is perhaps unnecessary to remark that this army regulation has the force of an act of Congress.

If there be any doubt as to the construction of these two orders, that doubt, under well-known principles of statutory construction, should be resolved in favor of the prisoner; and this, moreover, is strictly in accordance with the rules of grammatical construction, for "limits" manifestly refer to the *quantum* of punishment and not to the class or status of the offenders.

It is suggested that there is no reasonable doubt. The intention manifestly was to extend the application of the original order to officers, else what reason for existence has Sec. 938, above set out?

The order of March 20, 1895, was in operation, and there was no need to repeat it in the army regulation. Or, if there were such necessity then why was not the application restricted in terms to enlisted men, or why was not the original order simply repeated at length in the regulations?

If, then, these "limits" are applicable to the case of Captain Carter, the result is that the entire sentence of imprisonment is void, because in excess of the power of the court-martial to inflict. This is the rule announced by the better reasoned cases. Indeed, in nearly every case announcing a different doctrine it will be found on examination that there existed some *statute which authorized the court* (*nisi prius* or appellate) *to cut down the term to the maximum allowed by law.* Church has fallen

into the error of stating the weight of authority to be that the sentence may be so reduced. The statement is true only when the statutory provisions above mentioned are taken into consideration.

The utmost extent of the doctrine under common-law principles is that where the judgment in a criminal case consists of more than one kind of punishment, the different kinds being readily severable, and one element is void, for any reason, an appellate court may set aside the void portion, leaving the valid portion to stand, as, *e. g.*, a sentence consisting of fine and imprisonment, where the trial court had no power to inflict imprisonment

In *Howell* v. *State*, 1 Or., 241, it appears that the defendant in the trial court was sentenced to "one year's "solitary confinment, and kept at hard labor in the peni- "tentiary of this state." The statute provided that no convict should be sentenced to solitary confinement to exceed twenty days at one time.

In reversing the case the court say: "This court, then, "must take the judgment of the court below as it is. We "have no power to take from, add to, or modify it. "It must speak for itself, and stand or fall, as in law it "is authorized or unauthorized."

A judgment of imprisonment with solitary confinement would seem to be more easily severable into two component parts, the one lawful, the other unlawful, than a term of imprisonment longer than that allowed by the statute; and if the court could not find power to declare the solitary confinement part void, leaving the imprisonment to stand, *a fortiori*, could it not remit one or more years from an excessive term of imprisonment.

In *State* v. *Child*, 42 Kan., 611, the defendant below

was charged with an assault feloniously made with a deadly weapon, but the indictment failed to allege a specific intent to kill, etc. Defendant was sentenced on conviction as for a felony. It was suggested on appeal that the Supreme Court might change the punishment so as to conform to that denounced against an assault and battery, which latter was sufficiently alleged in the indictment. This the court declined to do, and reversed the case. The opinion was written by Judge Johnson, with whom concurred Judge Horton, one of the ablest of western jurists.

In *ex parte Page*, 49 Mo., 291, which was a *habeas corpus* case, petitioner had been sentenced to ten years in the penitentiary on an indictment for grand larceny, the maximum allowed by statute being seven years. The Supreme Court discharged petitioner. Say the court through WAGNER, J., a careful and conscientious judge, at page 293: "It has been suggested that if the prisoner "is not discharged, we should reduce the term so as to "bring it within the limit prescribed by statute. * * * "We are not aware of any authority by which we can "undertake to modify a criminal sentence."

In *Graham* v. *Weeks*,, 138 U. S., 4 1, Graham had been sentenced by the state court of Wisconsin for thirteen years, the maximum allowed by statute being ten years. On *habeas corpus* the Supreme Court of Wisconsin declined to discharge, holding the overplus of sentence to be severable.

On error to this court, it was held that no Federal question was prescribed, and the judgment of the state court was affirmed.

Mr. Justice Field, however, in his opinion stated: "It is undoubtedly the general rule that a judgment

"rendered by a court in a criminal case must conform "strictly to the statute, and that any variation from its "provisions, either in the character or the extent of the "punishment inflicted, renders the judgment absolutely "void; but it seems that under the law in Wisconsin, a "judgment in a criminal case which merely exceeds in "the time of punishment prescribed by the sentence that "which is authorized by law, is not absolutely void but "only erroneous. * * *"

It is a fair inference from the above language of Mr. Justice Field that, personally at least, that eminent jurist believed a sentence of imprisonment in excess of the amount allowed by law is totally void. And this would seem to be consonant with reason. The judgment is for a specified term of years; it is for an entire and indivisable thing—a period of time. To sever from that period a given portion is to change and make different the adjudication of the trial court. There is no logical parallelism between such a judgment and one consisting of two parts, one valid and one beyond the power of the court to render; as, *e. g.*, a fine and imprisonment, the statute denouncing only fine. In such case the sentence of imprisonment is a mere *brutum fulmen*, possessing no validity whatever, in whole or in part, and may be entirely disregarded.

This position is not in conflict with the decision of this court in the Pridgeon case, 153 U. S., 48. There the question was whether the addition of the phrase "hard labor" to a sentence of imprisonment, the statute providing only for imprisonment, rendered the judgment totally void. This court held it did not. But the reasoning proceeded on the fact that, under the law, the trial court, in its discretion, could appoint as the place of

punishment a penitentiary at which hard labor was part of the discipline; and that such provision of the law was thus read into every section of the statute providing for imprisonment in a penitentiary.

VI.

IT STANDS ADMITTED IN THIS RECORD THAT NO EVIDENCE WHATEVER WAS DELIVERED BEFORE THE COURT-MARTIAL TENDING TO SHOW THE GUILT OF CAPTAIN CARTER.

The allegation of the petition is as follows: "Your "petitioner avers that there was no evidence delivered "before said court-martial which tended to show that any "crime whatever had been committed, or which tended "to show that any crime had been committed by the "said Captain Carter; but, on the contrary, all of said "evidence, taken together, affirmatively showed that "there was no *corpus delicti;* and that said Carter was "wholly innocent of any wrong doing. * * *"

The return fails to deny this allegation or any part thereof, and, therefore, by the well-known rules of pleading, the averment stands admitted. This is elementary.

Gould on Pleading, Sec. 98 (5th Ed. Heard).

Stephen on Pleading, Sec. 132 (Andrew's Ed.).

The question here presented, as to whether or not the sentence of a court-martial is void, if there be no evidence whatever tending to support the finding of guilty, is of first impression in the Federal courts. A diligent

search has revealed to the writer but one adjudication on the particular point.

In *People* v. *Townsend*, 10 Abb. New Cas., 169, it was ruled that if there was no evidence at all before the court-martial tending to prove the matters alleged in the specifications, the court-martial had no jurisdiction to punish, and that the matter could be inquired into collaterally.

This would seem to be right on principle, because if no crime has been committed no jurisdiction to punish can possibly attach. Under the cases in this court, three things are necessary to validate the criminal judgment of an inferior tribunal—jurisdiction of the person, jurisdiction of the subject-matter, jurisdiction to pronounce the particular judgment.

If there be no crime committed how can it be said such court had jurisdiction of the subject-matter? The subject-matter in a criminal case *is* the crime. If these three requisites be of equal importance, and two may be inquired into collaterally, why may not the third?

The rule has been invoked as against a committing magistrate, and where the evidence adduced shows that no crime has been committed the prisoner will be discharged.

Ex parte McNutty, 77 Cal., 164.
In re Eberle, 44 Kan., 472.
In re Brandan, 26 Fla., 142.
Ex parte Kearney, 55 Cal., 212.
Ex parte Jackson, 45 Ark., 158.
In re Simon, 13 N. Y. Sup., 399.

If the Republic is to embark on a scheme of territorial aggrandisement; if we are to have a constantly increasing army and navy; if countless alien peoples—Philippinos,

Cubans, Chinese—are to be brought under the jurisdiction of these summary courts, whose procedure is uncouth to the American lawyer and whose power is bounded by such vague notions as customs of the service, martial law and the laws of war, would it not be well carefully to re-examine former procedents to ascertain if they be founded on the bed-rock of American liberty? If so, all will be well with us.

Courts-martial are "inferior courts of limited juris-"diction whose judgments may be question collaterally" say this court in *ex parte Watkins*, 3 Pet., 193, 207; and if so their judgment should not be hedged about with any more safeguards than those of justices of the peace.

Instances are readily supposable where a contrary doctrine would work injustice shocking for enlightened civilization to contemplate. It is common knowledge, for example, that the commanding officer in the Philippines has issued most stringent orders respecting sedition in Manila. That city, as well as the whole Island of Luzon, is under military law, and all persons now on the island are subject to trial by courts-martial or military commissions. Let us suppose a Philippino in Manila is arrested charged with sedition and tried before a military commission, convicted and sentenced to be shot. Suppose the evidence plainly showed that no offense known to the laws of war had been committed. Is there no remedy? If it be said that extreme cases make bad precedents, I point in England to Admiral Byng, shot, as Voltaire said, to encourage the others; in France, to the Duc D'Enghein, whose grave was dug before the court assembled to try him; in the United States to General Porter, to Milligan, to Mrs. Surratt.

The fundamental trouble with this case of Captain Car-

ter is that it was one which never should have been referred to a military tribunal for trial. As remarked before, the crime, if any, was committed, in conjunction with others, civilians, not amenable to the jurisdiction of a court-martial. The civil courts were open; in them all parties, soldiers and civilians, could have been tried by and according to the practice and procedure dear to every Anglo-Saxon, according to the formulas which for centuries our race has struggled to perfect—the common law.

Courts-martial are well enough to try strictly military offenses—conduct unbecoming an officer and a gentleman, cowardice, desertion and the like. But they are utterly unfit, because not intended for, the trial of complicated cases such as that against Captain Carter; unfit, moreover, because they cannot compel the production of books and papers nor the evidence of civilians. How this last hampered Captain Carter it is not for me to say, for it is *dehors* the record; but it is not difficult for this Court to imagine that the defect mentioned may well be fatal to an accused officer, if courts martial are to embark generally on the trial of such cases as this.

In conclusion, with not a little hesitation, and of course with the utmost deference and respect, I venture to suggest as a lawyer who has had much practical experience with courts-martial that the civil courts insensibly have come to regard the decisions of such tribunals as carrying with them too much of the weight of the judgment of a court of general jurisdiction. It was not so in the time of Loughborough in the case of *Grant* v. *Gould*, 2 H. Bl., 69, which was an application for the writ of prohibition to prevent the execution of the sentence of a court martial. The Lord Chief Justice went very fully

into the evidence adduced before the court-martial to ascertain if any material matters had been improperly admitted, and also to see if the evidence supported the finding under the charge, and if the offense of which petitioner had been convicted was a crime under the mutiny act.

If it be said that such practice is impracticable at this day, it may be answered that there is somewhere, between the two, a golden mean.

"I would fain know," said Lord Holt in *Rex* v. "*Whistler*, Holt's R., 215, "when a penalty is inflicted "and a different manner of trial from *Magna Charta* "instituted, and the party offending, instead of being "tried by his neighbors in a court of justice, shall be "convicted by a single justice in a private chamber, upon "the testimony of one witness, if on a consideration of "such a law we ought not to adhere to the letter."

In the constitution of Illinois it is said: "A frequent "recurrence to the fundamental principles of civil gov- "ernment is absolutely necessary to preserve the bless- "ings of liberty."

Ill. Const., 1870, Art. II, Sec. 20.

All of which is respectfully submitted.

FRANK P. BLAIR,
Attorney for Appellant.

J. M. WILSON,
Of Counsel.

No. 251.
Brf. of Wilson for Appt. on mo.
FILED
APR 8 1901
JAMES H. McKENNEY,
Clerk.
Filed April 8, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 567.

I. STANTON CARTER (ON BEHALF OF OBERLIN M. CARTER), APPELLANT,

vs.

ROBERT W. McCLAUGHRY, WARDEN OF THE UNITED STATES PENITENTIARY AT FORT LEAVENWORTH, KANSAS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

OBERLIN M. CARTER, *Petitioner*,
By JEREMIAH M. WILSON,
His Attorney.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 4-8-'01

Supreme Court of the United States

OCTOBER TERM, 1900.

No. 567.

I. STANTON CARTER (ON BEHALF OF OBERLIN M. CARTER), APPELLANT,

vs.

ROBERT W. McCLAUGHRY, WARDEN OF THE UNITED STATES PENITENTIARY AT FORT LEAVENWORTH, KANSAS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

Comes now the said Oberlin M. Carter (on whose behalf the petition was filed in the above-entitled case), by Jeremiah M. Wilson, his attorney, and moves the court to admit him to bail pending the final adjudication of the said case in this honorable court, and in that behalf states that, as will more fully appear by the printed record in the said case, he was a captain in the Corps of Engineers of the United States Army; that he was tried before a court-martial on charges of conspiracy to defraud the United States, and specifications thereunder, and also for embezzlement of the moneys of the United States; that he was convicted, as in

said record more specifically appears, and sentenced to pay a fine of five thousand dollars ($5,000), to imprisonment in the United States *penitentiary at Fort Leavenworth*, Kansas, to dismissal from the service, and to publication of the sentence of the court; that the said fine of five thousand dollars ($5,000) has been paid, he has been dismissed from the service, and said publication has been made, and the question presented in the proceeding herein by *habeas corpus* is as to whether the court-martial had jurisdiction to impose the punishment of imprisonment upon him to which he is now being subjected; that, by virtue of the said sentence, he is now imprisoned in the said penitentiary, and held in custody by the said Robert W. McClaughry, and has been since the 27th day of April, A. D. 1900; that, as likewise appears by the said record, he has been indicted in the United States district court for the southern district of Georgia, with Benjamin D. Green, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, and Michael A. Connolly, for the same offenses for which he was tried before the said court-martial, and which said indictment is still pending against him.

He further shows to the court that, since his said imprisonment, his health has become impaired, as more fully appears in the affidavits hereto attached, and to which reference is hereby made, for the purposes of this motion, and, in furtherance of his said motion, says that it is of great importance to him that he be relieved of said imprisonment pending his said appeal to this honorable court because of the necessity for making preparation for the trial of the said case in said court and for the reasons specifically set forth in his affidavit hereunto annexed, to which reference is hereby made, and he prays that the same may be considered as a part of this motion.

In consideration of the matters hereinabove referred to, petitioner prays that he may be enlarged upon bail, upon such terms as to recognizance as this court may pre-

scribe, pending the hearing and determination of the appeal in the above-entitled cause, in conformity with the statute and rules of this court in such case made and provided.

OBERLIN M. CARTER, *Petitioner*,
By JEREMIAH M. WILSON,
His Attorney.

WASHINGTON, D. C., *April* 6, 1901.

IN THE SUPREME COURT OF THE UNITED STATES.

OBERLIN M. CARTER, on the Petition of I. STANTON CARTER,
Plaintiff in Error,
vs.
ROBERT W. MCCLAUGHRY, *Defendant in Error.*

STATE OF KANSAS,
Leavenworth County, } *ss:*

F. M. Thomas, being duly sworn, says that I am a practicing physician in the city and county of Leavenworth, State of Kansas, and have been such for seven years last past, and a graduate of the University of Louisville. I was for five years the prison surgeon at the Federal penitentiary in which Captain Carter, the petitioner in the above-entitled cause, is now confined. I was such surgeon at the time Captain Carter was received at the prison, and so know the condition of his health at the time of beginning his course of confinement there. I was called to examine him professionally on yesterday, April 1, 1901, and was thus able to contrast the condition in which he now is with that in which he was when he was received at the prison, in the spring of 1900. At the time he arrived at the prison he

was in good health. My examination of yesterday disclosed that he was suffering from neurasthenia. He was very nervous, his nervousness manifesting itself, among other ways, by a restlessness and seeming inability to sit still and a constant walking of the floor. This was unusual in him, as nothing of the kind characterized him at the time I was surgeon at the prison, which was for seven months after he first came to the institution. On closer examination I found that his face was flushed, and that it would alternately flush and become pale, and that his skin was abnormally dry. His head felt hot when your hand was placed upon his forehead. He complained of headaches in the top and forward part of his head. His pulse was rapid and upon slight exertion increased very materially in rapidity. There was a twitching and tremor about the muscles of the face which I had never noticed before during my acquaintance with him. I noticed a loss of memory with him, and especially verbal memory—that is to say, he would not be able to remember some word that he would want to use. The condition in which I find him shows plainly that he is suffering from neurasthenia, and that he is on the verge of a nervous collapse, which will not only jeopardize his general health, but his reason as well. I am of the opinion that if he is confined at the prison for any considerable period that the man will be a physical and mental wreck. My knowledge of Mr. Carter has been more than considerable, because during the time that I was prison surgeon and he was an inmate of the institution, which extended over the period of some four or five months, I met, saw, and talked with him every day. He was then, as now, employed as an attendant in the hospital, where my duties took me daily, and in that way I was brought in daily contact with him, and the contrast between his present condition and that in which he was at the time of his arrival at Fort Leavenworth is painfully marked.

F. M. Thomas, M. D.

Subscribed and sworn to before me this 1st day of August, A. D. 1901.

[seal.] David W. Flynn,
Notary Public.

My commission expires August 31, 1904.

IN THE SUPREME COURT OF THE UNITED STATES.

OBERLIN M. CARTER, on the Petition of I. STANTON CARTER, *Plaintiff in Error,*
vs.
ROBERT W. MCCLAUGHRY, *Defendant in Error.*

STATE OF KANSAS, *Leavenworth County,* } ss:

A. F. Yohe, being duly sworn, says: I am a practicing physician of the city of Leavenworth, county of Leavenworth, State of Kansas, and have been for twelve years last past, and am now the county physician of Leavenworth county, Kansas, and am a graduate of Rush medical college of Chicago, Illinois, and Bellevue Hospital medical college of New York. I was called today to examine Mr. Oberlin M. Carter, who is at present confined in the Federal prison at Fort Leavenworth, with a view of ascertaining his physical condition, and my examination disclosed that his nervous system was in a greatly disordered condition; that he is suffering from what physicians call neurasthenia, which is a medical term expressive of the idea that is ordinarily conveyed by the words nervous prostration. His symptoms indicate functional perversion to a most pronounced degree. I am informed by Doctors Walter and Thomas that the examination made of the patient on February 12th last disclosed abnormal perspiration, and beyond question his condition today disclosed abnormal dryness of the skin. His heart's action was weak and pronouncedly influenced by the slightest sentiment of any kind. The slightest exertion, either physical or mental, produced a flushing that indicated pronounced vaso-motor disturbance. He is also suffering from anemia. He has spinal tenderness; pronounced exaggeration of patellar reflexus. He has marked prehensile inco-ordination, as evidenced by his inability to touch a designated portion of his face when standing blindfolded. He has muscular inco-ordination, which manifests itself more particularly when his mind is absorbed in some topic of conversation, which is evidenced by a momentary loss of equilibrium.

His loss of emotional control is very marked. His lips

and chin would tremble and his eyes fill with tears without any reason whatever. The most ordinary subject will bring forth this manifestation of emotional weakness, so marked, indeed, as to be almost pitiful. The spinal irritation is also manifested by the manner in which he moved backward and forward under my directions when blindfolded.

All these things that I have enumerated are symptoms that point unerringly to the conclusion at which any physician would be obliged to arrive—namely, that he is suffering from neurasthenia. In my opinion as a physician, unless his surroundings are changed he will in a very short time develop a nervous condition far more grave than his present condition. In fact some of his symptoms at present point possibly to the fact that organic changes have already taken place, and beyond question, if his environments are not altered, such organic changes will take place in the near future.

A. F. YOHE, M. D.

Subscribed and sworn to before me this 1st day of April, 1901.

[SEAL.] DAVID W. FLYNN,
Notary Public.

My commission expires August 31, 1904.

IN THE SUPREME COURT OF THE UNITED STATES.

OBERLIN M. CARTER, on the Petition of I. STANTON CARTER,
Plaintiff in Error,
vs.
ROBERT W. MCCLAUGHRY, *Defendant in Error.*

STATE OF KANSAS,
Leavenworth County, } ss:

W. W. Walter says that he is a physician, residing and practicing in the city of Leavenworth, Leavenworth county, State of Kansas, and has been so practicing for more than seventeen years last past; that he is a graduate of the University of Pennsylvania, medical department; that he had occasion, professionally, to examine Oberlin M. Carter,

the petitioner in the above-entitled cause, with a view of determining the present state of his health, and on oath deposes and says:

I visited Mr. Carter on the afternoon of April 1, 1901, and found him suffering from a condition known as neurasthenia, or nervous exhaustion. Mr. Carter is 44 years old and prematurely gray. He has an abnormal tenderness of the scalp. He complains of much headache. He has fleeting neuralgias—in other words, sharp, darting pains. He has attacks of vertigo. He flushes and pales alternately in such a manner as to markedly indicate loss of emotional control. His emotions are easily aroused, and when once aroused are beyond his control, as is evidenced by the fact that tears fill his eyes frequently and without any cause. He manifests lack of memory, and there are times when he has complete lapses in this respect, losing the topic of conversation and jumping from one subject to another, without connection or relevancy, as he did several times when I was talking to him this afternoon. He has an unnatural dryness of the skin. The scalp and forehead are very hot to the touch and his feet are quite cold, while his bodily temperature is normal. He manifests muscular weakness and inco-ordination, and discloses an impairment of his mental faculties.

Judging from the man's present condition, I consider he is on the verge of a complete break-down, and the neurasthenic condition is most likely to develop in melancholia, or some kindred form of insanity, if the conditions under which he is now living continue, as I am convinced that his present condition is due to his present environments.

W. W. WALTER.

Subscribed and sworn to before me this first day of April, 1901.

[SEAL.] DAVID W. FLYNN,
Notary Public.

My commission expires August 31, 1904.

IN THE SUPREME COURT OF THE STATE OF KANSAS.

OBERLIN M. CARTER, on the Petition of I. STANTON CARTER,
Plaintiff in Error,
vs.
ROBERT W. MCCLAUGHRY, *Defendant in Error.*

STATE OF KANSAS,
Leavenworth County, } *ss:*

S. F. Neely, being duly sworn, says that he is the mayor of Leavenworth city, Kansas; that he is a resident of Leavenworth city and has been such resident for the last thirty years; that for many years he was a practicing physician in said city prior to the time of his taking office under the United States Government as a United States marshal; that he has at all times kept in touch with the medical profession in this community, and knows and states the fact to be that Doctors W. W. Walter, F. M. Thomas, and A. F. Yohe are among the leading physicians of our city and State; none stand higher than they in their profession, and as citizens they are, beyond question, high-minded gentlemen.

S. F. NEELY.

Subscribed and sworn to before me this 1st day of April, 1901.

[SEAL.] DAVID W. FLYNN,
Notary Public.

My commission expires August 31, 1904.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

OBERLIN M. CARTER, on the Petition of I. STANTON CARTER, *Petitioner,*
vs.
ROBERT W. MCCLAUGHRY, *Respondent.*

Affidavit.

STATE OF KANSAS, *Leavenworth County,* } *ss:*

Oberlin M. Carter, being duly sworn, says that he is the petitioner in the above-entitled cause, and as a ground why his application to be enlarged upon recognizance pending his appeal in the above-entitled matter should be granted, and as good reasons why the same should be done, says:

I am innocent of the charges upon which I was convicted.

* * * * * * *

The only way in which my innocence may be established is by pressing to a final hearing the charges embraced in the indictment found by the grand jury in the United States district court for the district of Georgia, and which cannot be tried because of my absence therefrom. If such a trial could be had, then my cause could be tried before a court where law is administered judicially, which can compel the attendance of witnesses both for the Government and for the defense, and whether such witnesses be soldiers or civilians.

The court-martial by which I was convicted had no power to compel the testimony of civilian witnesses or require the production of civil documents and records, and as a consequence those things which would have demonstrated my innocence beyond a peradventure were not presented to that court because of the absence of this power.

Yet such a trial would be a vain and futile thing if the

witnesses by which my innocence can be established should at the time of such trial be dead. Many of these witnesses are old men, and every day's delay increases the chances of their demise. Already the following-named witnesses, whose testimony would be of inestimable value to me, have died, namely, Generals Newton, Duane, Casey, and Gilmore, Major Post and Captain Bailey, Mr. Coulson, Mr. Meigs, and Mr. Reed.

One of the witnesses now living, whose testimony is essential to the rehabilitation of my character, is my father-in-law, Mr. Westcott, who is an old man now, some seventy-five years of age. Despite what I am told of his statements elsewhere, I know that when on the witness stand face to face with me he will not deny that the funds that I expended at Savannah in excess of my pay were provided by him. Another witness is General Craighill, now nearly seventy years old. He is the only living officer who was my commanding officer who knows how my work was done from personal knowledge resulting from inspection and examination at the time that the work was done. He was before his retirement first my division engineer, and later chief of engineers, and would testify, as he did before the court-martial, that my work was the most successful and economical work of its kind in the world, and that I was entitled to all the credit therefor.

The deceased witnesses whom I have named above, to wit, Generals Newton, Duane, Casey, and Gilmore, and Major Post and Captain Bailey, all possessed in some degree the same knowledge now possessed alone by General Craighill; but they, as I have already stated, are dead. I am informed that the testimony given by General Craighill before the court-martial could not be employed by me as evidence in my trial in the United States district court of Georgia in the event that he should die before such trial was had, and should he die without having first testified in my behalf in said matter I would be without the means of demonstrating in the most satisfactory manner the character of the work done by me, it being my idea that the fact that I did this work in accordance with contracts approved by General Craighill, and more economically than any work of the kind that was ever done, and that the results were better, is certainly some evidence of the fact that the money appropriated

and expended for that work did not become the fruits of fraud.

Another gentleman whose death has deprived me of valuable testimony is Mr. Reed, of the firm of Reed & Flagg, who were for many years Mr. Westcott's brokers, and who testified that he knew that Mr. Westcott had given me the money, as I claimed, and that the business I transacted with his firm, as Mr. Westcott's attorney-in-fact, was actually the business of Mr. Westcott, knowing these facts from his intimate knowledge of Mr. Westcott's financial affairs. This statement of Mr. Reed is in writing and is in the office of the War Department, at Washington, though they have ever and always refused to me and my counsel a copy of the same. This testimony, however convincing it might be, from a moral standpoint, of course as legal evidence, is *nil*. Mr. Flagg, the surviving member of that firm, who knows much less of the matter than Mr. Reed did, possesses considerable knowledge of this phase of the case, and should death overtake him this portion of my proof would be annihilated.

Mr. Wisner is another witness whose testimony is of great value. He is one of the leading engineers in the United States and the world. He examined my work at the time it was attacked. This fact gives him greater knowledge of its character than could be obtained by any person who inspected it years later, though of course not so perfect a knowledge as is possessed by those officers who examined the work at the time it was being done. Mr. Wisner is an old man, advanced in years, though I am unable to state his exact age, and, more than that, his health is not good.

If I should be enlarged upon recognizance, I should at once proceed to Savannah, where the United States district court is now in session and where I am confident a trial will be given me, where all the facts bearing upon this case will be brought before a proper tribunal and my innocence established. The interval that lies between the time of this application and the time when my case can be heard in the Supreme Court will be ample for the purpose hereinbefore indicated. Should my enlargement not be authorized and the Supreme Court decide my appeal adversely, there can then be no judicial investigation of the merits of my case until it is too late for justice to be done.

Again, I am informed by my counsel that my study of the case has been such that I can be of more than material

assistance to them in the preparation of the briefs which will be employed in the Supreme Court in the pending proceedings, and by virtue of that fact my assistance is essential to a proper preparation of my case on appeal.

Further, much of the evidence necessary to my defense before the United States district court in Savannah must be based on expert, scientific knowledge, and no man can get together for me such facts as well as I can do it for myself, since I was in charge of the works there some fourteen years. However, if it were possible for another to do the work for me, it could only be done by experts, the price of whose services to the extent necessary in my case would be prohibitive.

Again, although the Government preserved my original vouchers, they seized every retained voucher, and I have not been permitted to have either original or copy. Every paper I had relating to my trial was seized, as was also my private letters sent and received by me in the last twenty years. My private accounts and bills and those of my dead wife, all were seized, and all still illegally held by the Government, and a personal inspection of them is imperatively necessary for my effective defense.

And, finally, my health has been seriously affected by the eighteen months of confinement to which I have been subjected. I urge this ground with great diffidence, because I recognize that if the court to which this application is being made should deem me guilty that the question of my health is bound to be a matter of little consequence, but if the Supreme Court should declare that I am unlawfully confined, then, surely, a wrong will have been wrought out if my health has been permitted to suffer by unlawful confinement. I appreciate that I have received at the hands of the prison authorities such kindness as the strict discipline of the institution makes possible, but to one of my temperament and sensibilities the things that imprisonment compels one to endure engender a mental suffering that is impossible to be told.

I recognize the fact to be that if I were guilty and the punishment inflicted upon me as a result of my guilt should destroy my health that there is no remedy for such a situation, but if I am innocent, which I know is a fact and which I can establish if given an opportunity, then it surely would be hard to have my health destroyed until, at least, the

court of last resort has determined that a punishment that may produce this result can lawfully be inflicted upon me.

O. M. CARTER.

Subscribed and sworn to before me this 15th day of February, 1901.

[SEAL.] ARTHUR M. JACKSON,
Notary Public.

My commission expires August 2, 1901.

2847

Office Supreme Court U.S.
FILED
APR 18 1901
JAMES H. MCKENNEY,
Clerk

No. 251.

Motion to strike out brief.

567

Supreme Court of the United States

OCTOBER TERM, 1900.

Filed April 18, 1901.

I. STANTON CARTER, on Behalf of OBERLIN M. CARTER, Appellant,

vs.

ROBERT W. McCLAUGHRY, Warden of the United States Penitentiary at Fort Leavenworth, Kansas.

Statement and Motion as to Brief of Solicitor General.

In the application made by Oberlin M. Carter for admission to bail it was briefly stated that the question now pending in this case before this court, and the only question, is whether the court-martial that tried Captain Carter on certain charges and specifications had jurisdiction to impose the penalty of imprisonment, to which he is now being subjected in the penitentiary at Leavenworth, Kansas.

Carter claims that that court did not have jurisdiction, and, for the purpose of having that question determined, instituted this *habeas corpus* proceeding; and, the decision

being against him in the court below, he brought the case to this court, and is asking only for the judgment of this court on that question.

This court has decided so many times that a proceeding in *habeas corpus* cannot be used as a writ of error or appeal, and the law on this subject being so well settled, it is useless to cite authorities in that regard. Counsel for Captain Carter, recognizing this well-settled condition of the law on this subject, has not sought to have this court consider any question of error that might have occurred in the trial of the case before this court-martial, either in the admission of evidence or the refusal to admit evidence, nor to review the evidence, for the purpose of trying to have this court determine that the court-martial had committed error in respect of the admission or rejection of evidence or in its conclusions upon the weight of the evidence. To have done so would have justly subjected counsel to a rebuke by this court.

The Solicitor General, in his brief in opposition, has taken occasion to make some very broad assertions in regard to the guilt of Captain Carter not based upon any matters appearing in the record, but apparently based upon matters appearing in some other proceeding in New York, before a commissioner, to which proceeding Carter was in no way a party; and also, upon his own allegations, that the Government had discovered evidence which would demonstrate that Carter and others had defrauded the Government of $2,169,159.06, and that Carter had personally attended to the division of this money between himself and others, and he enters upon a description of the manner in which this division was made.

How the Solicitor General got these alleged facts or from whom he got them he does not say; and upon what legal principle he would attempt to justify the interjection of matters of this kind in a proceeding of this character it is impossible to conceive. I venture to say that he will not pretend that the matters to which allusion has been made were ever procured in any proceeding wherein Captain Carter had an opportunity to be heard.

In view of this broad denunciation of Captain Carter by the Solicitor General, upon assertions of facts not found in any record to which Captain Carter was in anywise a party, and with reference to matters not before this court, and which have nothing whatever to do with the question that is before the court, I trust that I may, without transcending the bounds of propriety, state that Captain Carter denies the truth of these statements, asserts that he is innocent of the offense with which the Solicitor General charges him, and that he is ready, willing, and anxious to try the question as to whether he is or is not guilty of having conspired against the Government and embezzled its moneys, before any civil tribunal, anywhere and at any time that the Government will afford him an opportunity to be heard, and challenges the Government to afford him such an opportunity. If the Government knows, or believes it knows, what the Solicitor General has stated, alluded to above, there can be no difficulty in having this matter of his guilt or innocence of these charges determined by a tribunal that would have full jurisdiction, and guided by rules that have been long established for the furtherance of justice.

I respectfully submit this brief paper, because I have

thought I would not be doing my duty towards Captain Carter if I permitted these most extraordinary statements, made in this most unusual way, to stand upon the files of this court unchallenged, and I therefore move the court to strike the "Brief" of the Solicitor General from the files as irrelevant and scandalous.

J. M. Wilson,
For O. M. Carter.

Supreme Court of the United States

OCTOBER TERM, 1901.

No. 251.

I. STANTON CARTER, on Behalf of OBERLIN M. CARTER, Appellant,

vs.

ROBERT W. McCLAUGHRY, Warden, etc., Appellee.

APPEAL FROM CIRCUIT COURT, DISTRICT OF KANSAS.

Reply Brief on Behalf of Appellant, Filed by Leave of Court.

I.

The point made on page 17 of appellee's brief, that appellant should have traversed the return, is disposed of by the case of Seavey *vs.* Seymour, 3 Cliff., 439, 455.

Had appellee quoted the section next but one following the one cited from Church in his brief at page 17, the court would have been fully advised as to the law applicable.

II.

Replying to the objection that appellant did not refer to the 102d article of war, which forbids a second trial for the same offense, it is suggested that, in the view of appellant, that article is a work of supererogation. Appellant stands on the fifth amendment to the Constitution. Congress cannot detract from the rights guaranteed him by that instrument; and, knowing this, probably enacted the article as declaratory merely, and perhaps as a warning to military courts.

III.

On page 93 of its brief, appellee insists that appellant should have interposed a "plea" that he "was being twice tried for the same offense;" and on page 94 that "this plea was waived when the accused pleaded to the general issue"—meaning by the "general issue," we suppose, the plea of not guilty.

We reply that such a "plea" as the one suggested prior to the plea of not guilty is absolutely unknown to Anglo-Saxon law, either civil or military. The practice in criminal trials in common-law courts, where there are several counts in an indictment charging the same crime in different aspects, is to move the court to compel the prosecution, *at the close of the evidence*, to *elect* upon which count it will ask a conviction. No such motion is known to the law of courts-martial, nor any equivalent therefor. Indeed, the practice of charging the same offense under different articles is also unknown. If the court-martial should be of

opinion that the offense is laid under the wrong article of war, it is its duty to change it to a proper article.

Again, the accused could not be expected to know in advance that the court-martial would convict him more than once for the same offense. He was entitled to believe that the court would find properly and legally on the charges.

IV.

In the first charge and specification it is alleged that the entering into the contracts of 1896 was so conducted as to render such contracts fraudulent. If that be the contention of the Government, then the remaining three charges are void on their face, because these latter charge the accused with having committed a crime *for not having carried out these very fraudulent contracts.*

Both of these things cannot, in their nature, be crimes. If the contracts were fraudulent, then it could be no offense *not* to carry out their terms. If they were valid, then there could have been no conspiracy in entering into them.

In the case of Greene *et al. vs.* Henkel, at this term, the whole contention of the Government was that these identical contracts were fraudulent. Having assumed this position, the appellee here is bound thereby. It cannot be allowed to blow hot and cold at the same time.

If these contracts are fraudulent, how is it possible for it to be a crime on the part of appellant *not* to carry out the provisions thereof? And if this proposition be true, the second, third, and fourth charges go out of this case, and the appellant has been punished *three* times for one offense.

V.

The finding of guilty under the IV charge is void for the following additional reasons:

(*a.*) Sec. 5488, R. S. U. S., was enacted June 14, 1866.

The 62d article of war was taken from the Articles of the Earl of Essex, A. D. 1642, 2 Winthrop Mil. Law, p. 1118 (2d ed.). It was first enacted in the United States in the Continental Articles of 1775, in the precise terms now used, as article 50. (See 2 Winthrop, 1484.) It was re-enacted in the Code of 1806 as article 99.

It is submitted that inasmuch as the present article 62 has been in force since our Revolution, and since section 5488 was born as late as 1866, it is against all principles of construction of criminal statutes that the younger law should be imported into the older by *implication* merely.

(*b.*) The fact that Congress provided for a specific kind of embezzlement by article 60 is an implied prohibition against courts-martial having jurisdiction over any other kinds of embezzlement.

The first army embezzlement statute appears in the Articles of War of 1806 as article 39, in these terms:

"Every officer who shall be convicted * * * of "having embezzled or misapplied any money with which "he may have been entrusted, for the payment of men under "his command * * * or for other purposes," &c.

This was superseded by the act of 1863, known now as article 60.

It is submitted that Congress having legislated for the

army on the subject of embezzlement by the enactment of article 60, it intended to cover thereby the entire subject, so far as courts-martial are concerned.

(*c*.) Carter was *not* a disbursing officer; he was a purchasing agent. The specification under charge I shows that the contention of the Government before the court-martial was that he was charged with the purchase from the Atlantic Contracting Company of certain materials named, and that the fraud consisted in his accepting material inferior to that called for by the contracts. Whether or not the materials were inferior and less costly than those called for by the contracts was a matter of judgment and opinion. If we assume they were inferior, the payment for them does not bring appellant within the meaning of section 5488. The phrase there is intended to comprehend such officers as assistant treasurers, paymasters, and the like, but in these charges it appears that Carter was simply buying material, brush and stone; he was simply a purchasing agent.

To illustrate: The marshal of this court is charged with the duty of making certain purchases for the use of the court. Suppose some person, we will not say some envious person, but some person actuated by a supposed sense of duty, should charge him with having paid 5 per cent. over the market price for such supplies, or that such supplies were not quite up to the required standard. Let us further assume that the marshal had acted in the most perfect good faith in his purchases (and it must be borne in mind that *intent* is no part of section 5488); and, finally, let us suppose that some witness was produced who would swear that in his opinion the marshal had paid 5 per cent. in excess of the

market price, or that the supplies did not quite come up to the prescribed standard. Can he be convicted and sentenced to ten years in the penitentiary for a mere error of judgment? Is it supposable that Congress intended any such monstrous injustice?

VI.

The argument under the III head of appellant's brief is greatly reinforced by the fact that this court has practically overruled the Claasen case, 142 U. S., 140, cited on page 98 of appellant's brief, by the case of Ballew, 160 U. S., 187, 203.

The punishment in the Ballew case was two years at hard labor. (See volume 15, Transcript of Records in the clerk's office of this court.) This sentence was *less* than might have been inflicted under either of the two counts. This court however, reversed the Ballew case and remanded it for a resentence.

All of which is respectfully submitted.

FRANK P. BLAIR,
Attorney for Appellant.

H. G. STONE,
Of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

I. STANTON CARTER (ON BEHALF OF Oberlin M. Carter), appellant,
v.
ROBERT W. MCCLAUGHRY, WARDEN of the United States Penitentiary at Fort Leavenworth, Kans.
No. 567.

BRIEF OF THE SOLICITOR-GENERAL IN OPPOSITION TO THE APPLICATION FOR BAIL.

STATEMENT.

Oberlin M. Carter was a captain of the United States Army, assigned to the Corps of Engineers, and from April, 1888, to July, 1897, was in charge of the river and harbor improvement in the Savannah, Ga., district. He was arraigned and tried before a court-martial in Savannah, Ga., convened according to law, upon certain charges and specifications, and was convicted of four different offenses committed by him while in the military service of the United States, namely, conspiring to defraud the United States, in violation of the sixtieth article of war; causing false and fraudulent

claims to be made against the United States, in violation of the sixtieth article of war; conduct unbecoming an officer and a gentleman, in violation of the sixty-first article of war; and embezzlement, as defined in section 5488, Revised Statutes of the United States, in violation of the sixty-second article of war. He was thereupon sentenced by the court-martial to suffer a fine of $5,000; to be imprisoned at hard labor for five years; to be dismissed from the service of the United States, and to the publication of his crime and punishment as prescribed by statute upon a dismissal for fraud. This sentence was approved by the Secretary of War and confirmed by the President of the United States September 29, 1899.

On October 2, 1899, pending the execution of the sentence, Carter obtained from the circuit court of the United States for the southern district of New York a writ of habeas corpus, directed to the military authority having him in custody, for his production before the court, together with the time and cause of his detention. He was accordingly produced, and due return made, setting up that he was lawfully held in custody by authority of General Orders, No. 172, of September 29, 1899. During the pendency of the habeas corpus proceedings the fine imposed was paid. The circuit court (Judge Lacombe) dismissed the writ, and Carter was remanded to custody October 20, 1899. (Rec., p. 85; 97 Fed. Rep., 496.)

From this final order the petitioner prosecuted an appeal to the United States circuit court of appeals for

the second circuit (Wallace and Shipman, JJ.), which, on January 24, 1900, rendered a decision (Wallace, J.) *affirming the judgment* of the circuit court. (Rec., p. 97; 99 Fed. Rep., 948.)

On February 5, 1900, an application for a writ of certiorari to the circuit court of appeals was made to this court, which, on February 26, 1900, was denied. (176 U. S. 684.)

On the same day the writ was denied an appeal from the final order of the circuit court directed to this court was allowed by a judge of the circuit court, as also a writ of error. Thereafter a motion was filed by the Solicitor-General to dismiss or affirm, and on April 23, 1900, this court dismissed the appeal and writ of error. (177 U. S., 496.)

Respecting the general authority of courts-martial, the court, speaking by Mr. Chief Justice Fuller, said (p. 497):

> The eighth section of Article I of the Constitution provides that the Congress shall have power "to make rules for the government and regulation of the land and naval forces," and in the exercise of that power Congress has enacted rules for the regulation of the Army known as the Articles of War. (Rev. Stat., sec. 1342.) Every officer before he enters on the duties of his office, subscribes to these articles, and places himself within the power of courts-martial to pass on any offense which he may have committed in contravention of them. Courts-martial are lawful tribunals, with authority to finally

> determine any case over which they have jurisdiction, and their proceedings, when confirmed as provided, are not open to review by the civil tribunals, except for the purpose of ascertaining whether the military court had jurisdiction of the person and subject-matter, and whether, though having such jurisdiction, it had exceeded its powers in the sentence pronounced.

In accordance with the sentence of the court-martial, Carter was taken to the United States penitentiary at Fort Leavenworth, where he was received on April 27, 1900, and where he has since been confined.

On October 17, 1900, the application for a writ of habeas corpus, now before the court on appeal, was filed in the circuit court of the United States for the district of Kansas (Rec., pp. 1 to 31), and on November 5, 1900, an amendment to the application was filed (Rec., p. 32). The return of the warden set forth that Carter was being held in custody by authority of General Orders No. 172, of September 29, 1899, which was before this court both on the application for the writ of certiorari (176 U. S., 684) and on the motion to dismiss or affirm the appeal and writ of error (177 U. S., 496).

The court (Thayer and Hook, JJ., the latter delivering the opinion), dismissed the writ and remanded the prisoner (Rec., p. 102). The only additional fact before the court on this last application was that contained in the amendment (Rec., p. 32), namely, that on December 9, 1899, Carter, together with Greene and the Gaynors, was indicted in the United States district

court for the southern district of Georgia of a conspiracy to defraud the United States, which indictment was based on the same facts set out in the charges and specifications of which Carter was convicted.

Judge Hook, in his opinion dismissing the writ, states (Rec., p. 104) that "the merits of Carter's case as presented were considered by the circuit court for the southern district of New York and by the circuit court of appeals for the second circuit," but points out that "while the judgments of those courts are recognized as of highly persuasive authority, they do not amount to *res adjudicata*, nor prevent a reexamination of the same questions in a subsequent habeas corpus proceeding." Respecting the action of this court on the two occasions when Carter's case was brought before it, he says that it was "confined to a denial of the application for a writ of certiorari, which is not allowed as a matter of right, and to the dismissal of the appellate proceedings without a consideration of the merits of the case." For this reason he goes on to consider the case on the merits, states that he is in entire accord with Judge Wallace, "that under the sixtieth article of war it was competent to impose a fine for one charge of which the accused was found guilty and imprisonment for the other"—the essential point made—and finally dismissed the writ.

From this judgment an appeal has been taken to this court, and pending the hearing of the appeal an application is made for the admission of Carter to bail.

ARGUMENT.

The validity of Carter's conviction and sentence by the court-martial, which alone could try him for crimes committed as an officer of the United States Army in violation of the Articles of War, has been sustained by three civil courts and five judges, not counting this court, before which the matter is now pending for the third time. Carter now applies for the suspension of the just sentence of this "lawful tribunal" (177 U. S., 497), and asks to be released from imprisonment pending the hearing of this second appeal, upon the following grounds:

First. Because he is suffering from neurasthenia and is on the verge of nervous collapse by reason of mental anguish, owing to his imprisonment.

Second. Because he is innocent of the charges of which he was convicted by the court-martial (see application, p. 9), and the only way he can establish his innocence, so he says, is by pressing to trial the charges embraced in the Georgia indictment, which he asserts can not be tried because of his absence from Georgia.

It might be pointed out that these grounds are hardly consistent. A man suffering from neurasthenia and on the verge of nervous collapse is hardly in a condition either to prepare his case for trial or to undergo the worry and anxiety of a prolonged criminal prosecution. My limited experience leads me to believe that a quiet retreat, with light work, is to be preferred to the fret and worry of a court room for a person afflicted with a nervous trouble.

The fact that Carter's "temperament and sensibili-

ties" are such that imprisonment, as he says, "engenders a mental suffering impossible to be told," affords no reason for his release on bail. This is obvious. Otherwise, the very man who ought to be punished most severely, the man who has abused the greatest trust—whose training ought to have kept him from crime—for whom there is the least excuse, is the very one who will have the strongest case for relief, for he will worry most over his imprisonment along with common criminals. In this connection, however, I might point out that the mental anguish a man of Carter's former standing suffers is not due so much to mere confinement as it is to the infamy which attaches to a convicted criminal.

So much for this ground of relief, giving it all the force ascribed to it in the application. But on reading the affidavits filed by Carter, I directed the United States attorney for Kansas to have a thorough examination by competent physicians made of Carter's condition. He did so promptly and I have the result. He took with him to Leavenworth, Dr. Jacobs, of Emporia, Dr. Munn, of Topeka (who, he says, are perhaps the two most prominent physicians in Kansas), and in Leavenworth secured the services of Drs. Lane, Phillips, and Wever. These physicians made a careful examination of Carter and embodied the result of it in an affidavit in which they give in detail the facts bearing upon his physical and mental condition. Their general conclusion is as follows:

> Affiants further say that said Carter is not now suffering from neurasthenia; that he is not

on the verge of nervous collapse; that his nervous condition is not greater than we would expect to find in a healthy person of said Carter's standing confined in prison.

Affiants further say that said Carter is now physically and mentally sound.

The fact that Carter is now physically and mentally in good condition is confirmed by the affidavits of the warden and the prison physician. The latter states that Carter is hospital clerk and has charge of the greenhouse; that by reason of this fact he comes into daily contact with Carter, and that Carter is now physically and mentally sound, capable of attending to his duties and daily performing the same. A copy of these affidavits is attached as an appendix to this brief.

As to the second ground for release on bail, it is pertinent to inquire in what way Carter can establish his innocence of the charges of which he was convicted by a court-martial, through a trial on a criminal indictment in the United States court in Georgia. Would acquittal by a jury on a criminal trial operate as a reversal of the conviction by the court-martial? Will this court upon this application for bail take the view that a jury in the United States court in Georgia can determine whether the court-martial rightfully convicted Carter? To put these questions is to answer them. The fact that Carter is under indictment along with his co-conspirators has no relevancy in the consideration of this appeal or of the application for bail. But since Carter has dragged into this case the fact that he is under indictment along with Greene and

the Gaynors, and has sworn that the criminal case can not be tried because of his absence from Georgia, and asserts that he wants to be released so he may demand a trial by jury in Georgia, and prepare for it, it is proper for me to call the attention of the court to the fact that if the criminal case can not be tried without Carter, neither can it be tried without his co-conspirators, Greene and the Gaynors. Yet, ever since the indictment was found, in December, 1899, the Government has been strenuously endeavoring to secure the removal of Greene and the Gaynors from New York to Georgia for trial. In the desperate fight which Carter's co-conspirators have made against removal and trial before a jury, the United States has been compelled to produce before the commissioner in New York thousands of pages of testimony tending to prove the guilt of Carter and his associates. Over a year has been consumed in the introduction of testimony. The United States have been compelled, virtually, to try the case before the commissioner in order to secure the warrant for removal. And the matter has not yet been determined. Greene and the Gaynors are still in New York. It will be time enough for Carter to say that he is ready to go to Georgia for trial when his co-conspirators show by their conduct that they are willing to face a jury upon these charges.

And now, since Carter so vigorously asserts his innocence and makes his desire to establish it a principal reason for his release on bail, let me say that the Government, since Carter was tried and convicted by the

court-martial, have not ceased in the investigation of the fraudulent transactions in which he and his co-conspirators were engaged. In order to secure a warrant for the removal of Greene and the Gaynors to Georgia for trial, the Government procured and presented to the commissioner in New York, not the fleeting proof of oral testimony, but documentary evidence, books and papers, of enduring force, which demonstrate that Carter and Greene and the Gaynors, between January 3, 1893, and July 17, 1897, defrauded the Government of $2,169,159.06.

The division of this "swag" was attended to by Carter personally. When the time came to make a payment under the contract, Carter, who was located at Savannah and had charge of the work on behalf of the Government, would give to the representatives of Greene and the Gaynors, locally in charge at Savannah, a Government check sufficient to pay for the labor and materials which actually went into the improvement, and then he would draw a Government check for the excess of the contract price, representing what gamblers would call "the velvet"—the fruit of the fraudulent conspiracy—and putting this in his pocket, would go to New York. There he would meet Greene and the Gaynors. Then the division would take place. Carter would be specially allowed out of the amount $75 for traveling expenses and the balance would be divided into thirds—one-third going to Carter, one-third to Greene, and one-third to the Gaynors. In this way Carter drew out of the

conspiracy $722,528.02, and of this amount the records of stock-brokers in New York show that he invested in stocks and bonds $690,301.85. For his traveling expenses Carter received $1,575. He made twenty-one trips to New York on this mission and at the close was in excellent condition, financially, to be appointed military attaché at the Court of St. James.

I have seldom read a more interesting and romantic story of crime than is presented in this testimony. Is it any wonder that Carter and his associates have been able, with the money thus obtained, to fight this case the way it has been fought? Is it any wonder that appeal follows appeal and one eminent counsel succeeds another in the defense of this man? The Government knows that Carter had nearly $700,000 in stocks and bonds at the time suspicion was directed to his transactions. Where these stocks and bonds are now, or where the bulk of them are, it is to be presumed the Government does not know, or it would lay its hands on them. Is it any wonder that Carter wants to get out on bail? Is it any wonder that he desires to be put in a position where he can personally handle the sinews of war? What bail can the court fix that will be sufficient in his case, if he has sent his securities out of the country and made up his mind that the best thing he can do is to follow them?

JOHN K. RICHARDS,
Solicitor-General.

APRIL 15, 1901.

APPENDIX.

UNITED STATES OF AMERICA,
State of Kansas, ss:

I. E. Lambert, of lawful age, being first duly sworn, on oath, says: That he is the district attorney for the district of Kansas; that he is well acquainted with Drs. J. L. Wever, D. R. Phillips, and A. J. Lane, of Leavenworth, Kans., and they are leading physicians of the city of Leavenworth; that he is well acquainted with Dr. L. D. Jacobs, of Emporia, and Dr. L. H. Munn, of Topeka, Kans.; that they are leading physicians of the State of Kansas, with reputations for skill and ability coextensive with the State The former is one of the physicians and surgeons of the Atchison, Topeka and San Fe Railway Company, and the latter is chief surgeon of the Chicago, Rock Island and Pacific Railway Company.

I. E. LAMBERT.

SHAWNEE COUNTY, *ss:*

Subscribed and sworn to before me this 11th day of April, 1901.

[SEAL.] FRANK L. BROWN, *Clerk*,
By HELEN BUCKMASTER, *Deputy*.

UNITED STATES OF AMERICA,
State of Kansas, ss:

Dr. J. L. Wever, Dr. L. D. Jacobs, Dr. L. H. Munn, Dr. J. H. Lane, and Dr. Phillips, of lawful age, being first duly sworn, each for himself, says:

That he is a physician and surgeon; that at the request of the United States district attorney for Kansas, called upon Capt. Oberlin M. Carter, now confined in the Federal penitentiary at Fort Leavenworth, State of Kansas, for the purpose of making an examination of said Carter for the purpose of obtaining his physical and mental conditions.

Affiants further say that they made a careful examination of said Carter at said Leavenworth prison. After reaching said prison they were conducted to the office of Dr. McDill. Said Carter came to the room. After some conversation with him as to his nativity, the age of his mother, the age at his death of his father, and about some of his early associates—this for the purpose of estimating his mental stability—

We found, having in the meantime stripped him of his clothing, that his age was 44; his height 5 feet 9 (his own statement). We then took him to a pair of scales and weighed him, and found his weight to be 165 pounds. After, his pulse was counted and found to range from 90 to 96. After going down stairs and coming up and during the whole course of the examination there was no change in the pulse rate, it varying from 90 to 100. His temperature was 99, his respirations 19. His general appearance and general nutrition were good. There were no muscular tremors, no dyspnœa, no hiccough. His skin was clear, clean, moist, and supple. His sclerotic was not discolored. His pupil responded normally to light and accommodation. At no time during this examination was there any dilation or unstability of the pupillary reaction.

Measurements were made through the largest part of the arm, forearm, thigh, and leg, and found to be: Right arm, 11½ through biceps; right forearm, 11; left arm,

11, and left forearm, 10¼; right thigh, 19½, middle of middle third; left, 19¼; large portion of right-leg calf, 14; left, 14.

There were no trophic vasomotor or atrophic changes; Romberg's test negative. He performed the complicated act of buttoning and unbuttoning pants normally; he touched objects and nose normally. The cilio-spinal reflex was normal; the superficial reflexes, epigastric, cremasteric, and plantar were normal. There was no ankle clonus; the brachial and knee reflex was normal. The thermic sense, as was shown by blowing upon different portions of the body, was fully appreciated and differentiated by him.

No electrical tests were made or deemed necessary.

His tongue was clean and moist; there was no increased or diminished area of hepatic or splenic dullness. There was no tympanitis or tenderness of abdomen. The sphincter ani was firm; there were no external or internal pile tumors. Inspection, palpitation, percussion, and auscultation of chest were negative. Measurement of chest at fourth rib 35½ inches; measurement of abdomen level of umbilicus was 31¾. The area of cardic dullness normal; apex between 2½ inches below and ½ inch within nipple line; auscultation negative. Chest expansion 2½ inches.

There were no œdemas, no evidences of anæmia; the specimen of urine passed in our presence at 1.20 was clear, light amber in color, acid; specific gravity, 0.1018; no albumen by heat and nitric acid; no sugar by Fehling's test.

There were no areas of hyperæsthia or anæsthesia; no hyperogenic zones; no contraction of visual field; but the man manifested some emotional symptoms.

Affiants further say that said Carter is not now suffering from nuerasthenia; that he is not on the verge

of nervous collapse; that his nervous condition is not greater than we would expect to find in a healthy person of said Carter's standing confined in a prison.

Affiants further say that said Carter is now physically and mentally sound.

(Signed.) J. L. WEVER.
L. D. JACOBS.
D. R. PHILLIPS.
L. H. MUNN.
JAS. A. LANE.

Sworn to and subscribed before me this 10th day of April, 1901, at Fort Leavenworth, Kansas.

[SEAL.] JOHN C. RIPLEY,
Notary Public.

My commission expires September 1, 1904.

UNITED STATES OF AMERICA,
State of Kansas, ss:

David McDill, of lawful age, being first duly sworn, upon oath says:

That he is prison physician at the United States penitentiary located at Fort Leavenworth, State of Kansas; that he has filled said position since August 1, 1900; that he is well acquainted with Oberlin M. Carter, now confined in said penitentiary; that said Carter is hospital clerk and has charge of the greenhouse, and by reason of that fact this affiant comes in daily contact with said Carter.

Affiant further says that said Carter is now physically and mentally sound, capable of attending to his duties, and daily performing the same.

DAVID MCDILL.

Sworn to and subscribed to before me this 10th day of April, 1901, at Fort Leavenworth, Kansas.

[SEAL.] J. C. RIPLEY, *Notary Public.*

My commission expires September 1, 1904.

UNITED STATES OF AMERICA,

State of Kansas, ss:

R. W. McClaughry, of lawful age, being first duly sworn, upon oath says:

That he is warden of the United States Penitentiary located at Fort Leavenworth, State of Kansas; that as such warden he has in custody Oberlin M. Carter.

Affiant further says that since Carter's confinement in said prison he has met him several times each week and almost daily.

Affiant further says that, as far as he can observe, said Carter is now physically and mentally in good condition, except that at times the said Carter manifests a very nervous condition.

R. W. MCCLAUGHRY, *Warden.*

Sworn to and subscribed to before me this 10th day of April, 1901, at Fort Leavenworth, Kansas.

[SEAL.] J. C. RIPLEY, *Notary Public.*

My commission expires September 1, 1904.

O

No. 567. 251.

Sol. of Atty. Gen. (Richards) for Appellee (Corcoran)

Office Supreme Court U. S.
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APR 20 1901
JAMES H. McKENNEY,
Clerk

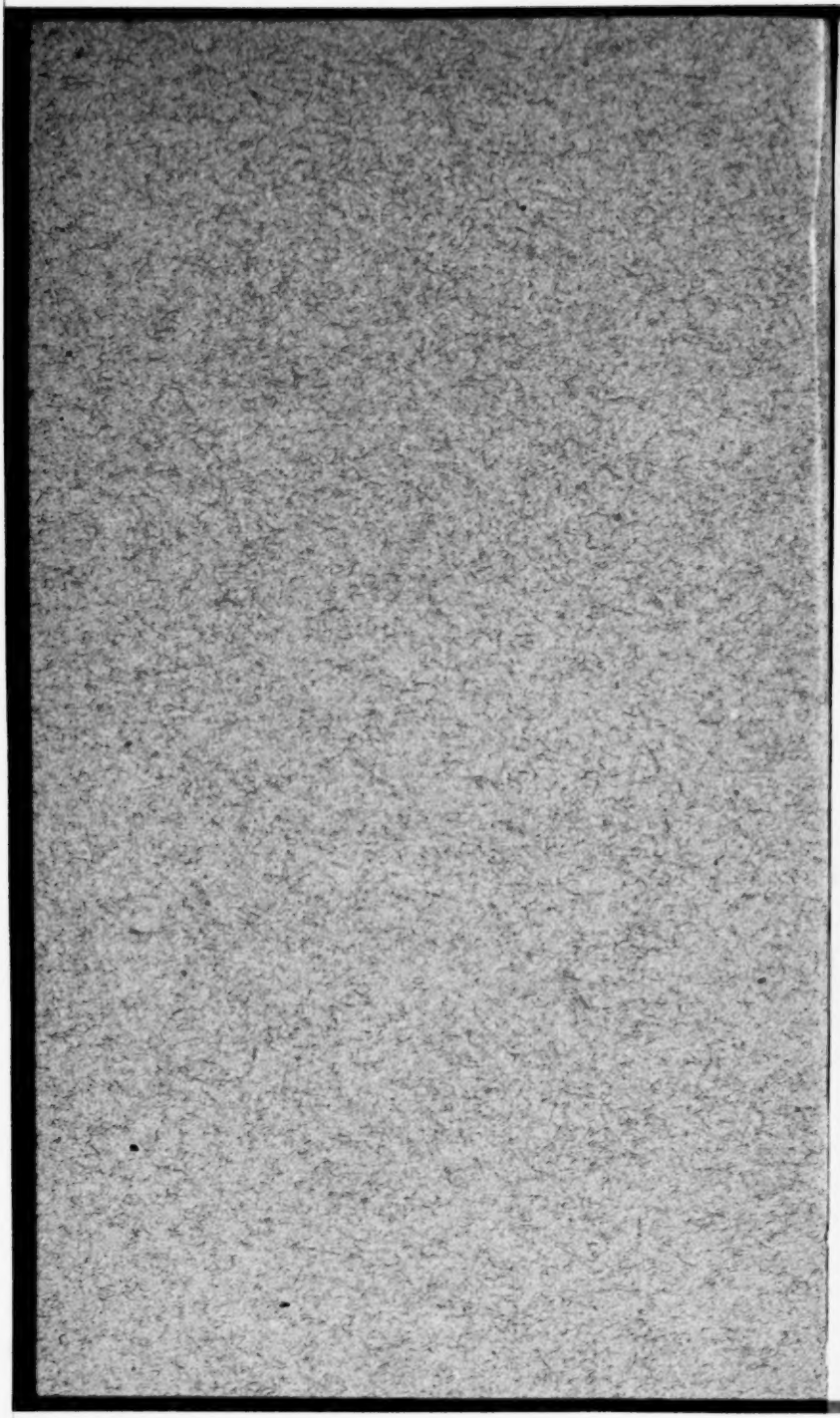
Filed April 20, 1901.

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

I. STANTON CARTER (ON BEHALF OF Oberlin M. Carter), appellant,
v.
ROBERT W. MCCLAUGHRY, WARDEN of the United States Penitentiary at Fort Leavenworth, Kans.
No. 567.

REPLY OF THE SOLICITOR-GENERAL TO THE MOTION TO STRIKE FROM THE FILES.



In the Supreme Court of the United States.

OCTOBER TERM, 1900.

I. STANTON CARTER (ON BEHALF OF Oberlin M. Carter), appellant,
v.
ROBERT W. MCCLAUGHRY, WARDEN of the United States Penitentiary at Fort Leavenworth, Kans.
No. 567.

REPLY OF THE SOLICITOR-GENERAL TO THE MOTION TO STRIKE FROM THE FILES.

The Solicitor-General, replying to the motion to strike his brief from the files "as irrelevant and scandalous," begs to say that he yields to no one in respect for the court or regard for the proprieties of practice. He always tries to observe strictly the rule that in the discussion of a case before the court counsel must confine himself to the facts which appear in the record. But he does not understand that that rule has any application to the present motion. The question now before the court is not whether the court-martial which convicted Carter had jurisdiction to impose the punishment of imprisonment which he is undergoing at Leavenworth, but whether, under the existing circumstances, he ought to be admitted to bail pending the hearing of his appeal.

The latter question has not been submitted to the court upon the record in the appeal, but upon the application of Carter supported by the affidavits of certain physicians and by his own. By this application and these affidavits Carter and his counsel raised questions entirely outside the record in his appeal. They averred—

First. That his health is impaired.

Second. That he is an innocent man, and wants to be released in order to be tried in the criminal case in Georgia.

The falsity of the first statement was established by the affidavits of five physicians in addition to those of the warden and the prison physician.

To demonstrate the falsity of the second statement it was necessary for the Solicitor-General to state briefly what the Government has done up to this time in the prosecution of the criminal indictment pending against Carter and his coconspirators in the United States court in Georgia. The facts stated appear in the documentary evidence presented by the Government to the United States commissioner in New York upon the hearing of the application for the removal of Greene and the Gaynors to Georgia for trial upon the criminal indictment. If counsel is unaware of this, it is because he has not consulted with the gentlemen who represented Carter on the former hearings before this court, and are now representing Carter's coconspirators in the bitter fight they are making against being removed to Georgia for trial.

Believing, from the facts in his possession, that Carter wants to get out neither for his health's sake nor in order to be tried upon the criminal charge in Georgia, the Solicitor-General has laid before the court the facts which, in his opinion, make clear the real object of this application. For this he has no apology to make. It is not his belief that a convicted criminal may assail the Government he has defrauded, and assert on oath whatever he pleases in support of his application to be released from punishment, while the representative of the Government before this court must stand mute and permit the charges and statements, however reckless and false, to go unchallenged to the court.

Recurring to the application, permit me to say in conclusion that the only feature which entitled it to notice was its audacity. Its supposed reasons were worthless; its alleged facts wholly without support. Taken at its best, the argument amounted to this: That Carter, having been convicted by one tribunal, should be released on bail—and thus while at large serve out a sentence already justly imposed—in order that he may be tried before another tribunal. Time enough for him to be released for another trial when he has served out his present sentence.

JOHN K. RICHARDS,
Solicitor-General.

APRIL 20, 1901.

No. 251.

Br. of Atty. Gen. (Clarke Clows) for Appellee.

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Clerk.

Filed Dec. 2, 1901.

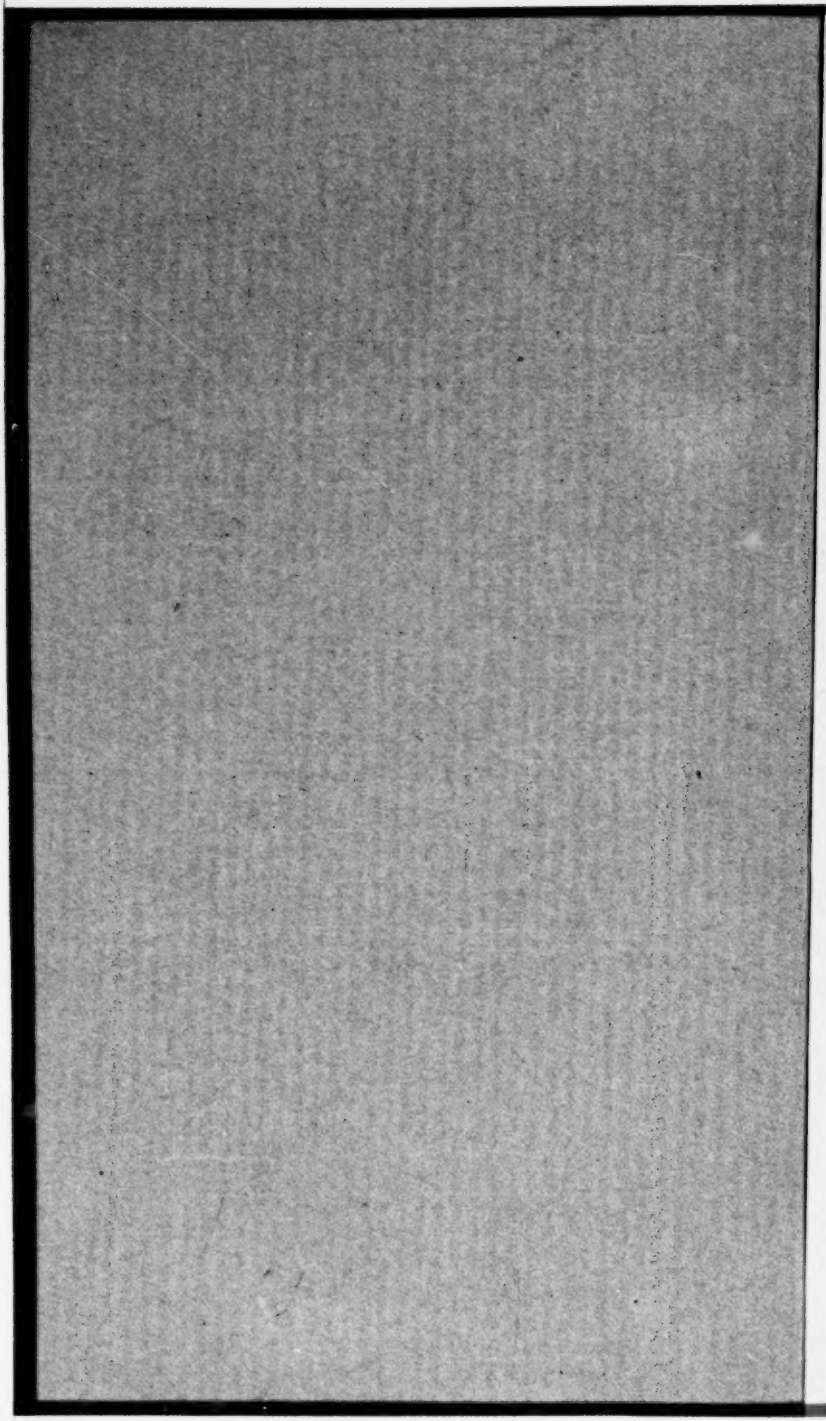
In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1901.

I. STANTON CARTER, ON BEHALF OF Oberlin M. Carter, appellant,
v.
ROBERT W. McCLAUGHRY, WARDEN, etc.
} No. 251.

APPEAL FROM THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF KANSAS.

BRIEF FOR APPELLEE.



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In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1901.

I. STANTON CARTER, ON BEHALF OF Oberlin M. Carter, appellant,
v.
ROBERT W. MCCLAUGHRY, WARDEN, etc.
No. 251

APPEAL FROM THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF KANSAS.

STATEMENT.

This case comes before the court upon appeal from the order of the circuit court of the United States for the district of Kansas remanding Oberlin M. Carter to the custody of Robert W. McClaughry, warden of the United States penitentiary at Fort Leavenworth, Kans.

The appellant was held in custody by the warden in pursuance and by virtue of a sentence of imprisonment imposed upon him by a general court-martial of the United States, which sentence was duly approved by the President and ordered to be carried into execution, as is shown in General Orders, No. 172, Headquarters of the Army, Adjutant-General's Office, Washington, D. C., September 29, 1899. This order, which

also sets forth the charges upon which the prisoner was arraigned, his pleas, and the findings of the court, was made part of the return in this case, record, pages 50 to 70, folios 1412 to 1448.

As these charges are voluminous, there being 37 specifications, and the sentence in this case as approved by the President is based upon four charges each with but one specification, these charges, with their specifications, for convenience and ready reference, are copied from the transcript, and are as follows:

> CHARGE I.—Conspiring to defraud the United States in violation of the sixtieth article of war.
>
> *Specification II.*—In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, devising and intending to defraud the United States and to aid The Atlantic Contracting Company, a corporation, and John F. Gaynor, William T. Gaynor, and Edward H. Gaynor, and Anson M. Bangs, and divers other persons, all of whom were likewise with him, the said Carter, devising and intending to defraud the United States, did, with the corporation and persons named, unlawfully combine and conspire to defraud the United States of divers large sums of money by aiding the said The Atlantic Contracting Company to obtain the allowance and payment of certain false and fraudulent claims hereinafter described; and in pursuance of the said conspiracy the said Oberlin M. Carter, in the months of June, July, and August, September, and October, 1896, being an officer of the United States in local

charge of the river and harbor district usually called the Savannah District, and of the improvement by the United States of rivers and harbors in said district, did, with the knowledge and consent of the said other parties named, so advertise for proposals and contracts for certain works of improvement in the harbor of Savannah, Ga., in said district, and so manage and conduct said advertising, and the matter of giving out information in regard to the contract to be let, and the matter of receiving proposals and awarding the contract, as to enable the said The Atlantic Contracting Company to secure the contract for said work, and to have the same entered into by the United States with it October 8, 1896; and in further pursuance of the said conspiracy the said The Atlantic Contracting Company afterwards, to wit, from about the 8th day of October, 1896, to July 31, 1897, did furnish and put into said work certain mattresses, stone, and other material which were different in kind and character from the mattresses, stone, and other material contracted for in said contract, and very much less costly to the said The Atlantic Contracting Company as well as of less value to the United States; which said mattresses, stone, and other material so furnished and put into the work the said Captain Carter, in further pursuance of said conspiracy, did receive and accept, and cause to be received and accepted for the United States, as and for the mattresses, stone, and other material contracted for; and did, on or about July 6, 1897, cause to be paid out of the moneys of the United

States, $230,749.90 to the said The Atlantic Contracting Company on account of the said furnishing and delivery of the same, and as if the said mattresses, stone, and other material had been such as were stipulated for in the contract, and at the same rate, cost, and price as if they had been.

And in further pursuance of the said conspiracy the said Captain Carter, about June, July, August, September, and October, 1896, did advertise for proposals for a contract for improving Cumberland Sound, Georgia, in said river and harbor district, and so manage and conduct the matter of such advertising, and the matter of giving out information in regard to the contract to be let, and the matter of receiving proposals and awarding the contract, as to enable the said The Atlantic Contracting Company to secure the contract for said work and to have the same entered into by the United States with it October 8, 1896; and in further pursuance of the said conspiracy, the said The Atlantic Contracting Company, from about the 8th day of October, 1896, to the 31st day of July, 1897, did furnish and put into said work certain mattresses, stone, and other material which were different in kind and character from the mattresses, stone, and other materials contracted for in said contract, and very much less costly to the said The Atlantic Contracting Company, as well as of less value to the United States; which said mattresses, stone, and other material so furnished and put into the work, the said Captain Carter, in further pursuance of

said conspiracy, did receive and accept, and cause to be received and accepted, for the United States, as and for the mattresses, stone, and other material contracted for, and did, on or about July 6, 1897, cause to be paid out of the moneys of the United States $345,000 to the said The Atlantic Contracting Company on account of said furnishing and delivery of the same, and as if the said mattresses, stone, and other material had been such as were stipulated for in the contract, and at the same rate, cost, and price as if they had been.

This on the 6th day of June, 1896, and thereafter, to the 1st day of August, 1897.

CHARGE II.—Causing false and fraudulent claims to be made against the United States, in violation of the sixtieth article of war.

Specification VI.—In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, being at the time the officer in local charge of river and harbor improvements in the Savannah river and harbor district, did cause to be made certain false and fraudulent claims against the United States and in favor of The Atlantic Contracting Company, a corporation, knowing the same to be false and fraudulent, to wit: The claim represented by the following voucher, submitted by the said Captain Carter, with his accounts, and marked 'Appropriation for improving harbor at Savannah, Georgia:'

Voucher No. 8, $230,749.90, July, 1897;

and the claim represented by the following voucher, submitted by the said Captain Carter, with his accounts, and marked 'Appropriation

for improving Cumberland Sound, Georgia and Florida:'

Voucher No. 9, $345,000.00, July, 1897; which said false and fraudulent claims the said Captain Carter caused to be made by knowingly permitting the said Atlantic Contracting Company, which had previously entered into contracts, dated October 8, 1896, to furnish the United States certain mattresses, stone, and other material, of specified kinds and qualities, for constructing works in said river and harbor district, to furnish and put into said works mattresses, stone, and other material different from, inferior to, cheaper, and of less value to the United States than those contracted for; and by receiving and accepting and paying for the same as of the kinds and qualities contracted for, and by falsely certifying to the correctness of the said vouchers, well knowing that the mattresses, stone, and other material charged for in said vouchers as having been furnished had not in fact been furnished; each of the said claims having been made in or about the month named in the above description of the voucher relating to it.

CHARGE III.—Conduct unbecoming an officer and a gentleman, in violation of the sixty-first article of war.

Specification II.—In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, being the officer in local charge for the United States of river and harbor improvements in the Savannah river and harbor district, did willfully and knowingly cause the following

amounts to be paid out of the moneys of the United States subject to his order and control as officer in charge of said improvements to the Atlantic Contracting Company, a corporation; the accounts on which the said were paid being false, and the amounts paid not being due or owing from the United States to the said company, or to anyone, and he, the said Captain Carter, well knowing this to be the case; the said accounts and amounts paid and the payments being those designated by the following voucher (and the entries therein and endorsements thereon) submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving harbor at Savannah, Georgia:'

Voucher No. 8, $230,749.90, July, 1897;

and the one indicated and designated by the following voucher (and the entries therein and endorsements thereon) submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving Cumberland Sound, Georgia and Florida:'

Voucher No. 9, $345,000, July, 1897;

each of the said payments having been caused to be made on or about July 6, 1897, by the said Captain Carter drawing and delivering a check, as such officer in charge of river and harbor improvements, by which the payment was ordered and directed to be made out of moneys of the United States under his control as such officer.

CHARGE IV.—Embezzlement, as defined in section 5488, Revised Statutes of the United

States, in violation of the sixty-second article of war.

Specification I.—In that Capt. Oberlin M. Carter, Corps of Engineers, United States Army, being the officer in charge for the United States of river and harbor improvements in the Savannah River and harbor district, and, as such officer in charge of said improvements, being a disbursing officer of the United States, and having entrusted to him large amounts of public money of the United States, did willfully and knowingly apply for a purpose not authorized by law large sums of the said moneys so entrusted to him by willfully and knowingly causing the amounts hereinafter named to be paid out of the said moneys which were subject to his order and control as such officer in charge of said improvements, the accounts on which the same were paid being false, the amounts paid not being due or owing from the United States to the parties paid, or to anyone, and he, the said Captain Carter, well knowing this to be the case; the said accounts, the amounts paid, and the payments being those designated by the following voucher (and the entries therein and the endorsements thereon) submitted by the said Captain Carter with his accounts and marked "Appropriation for improving harbor at Savannah, Georgia:"

Voucher No. 8 ($230,749.90), July, 1897.

and the one indicated and designated by the following voucher (and the entries therein and the endorsements thereon), submitted by the said Captain Carter with his accounts and

marked "Appropriation for improving Cumberland Sound, Georgia and Florida:"

Voucher No. 9 ($345,000.00), July, 1897.

each of the said payments having been caused to be made on or about July 6, 1897, by the said Captain Carter drawing and delivering a check as such officer in charge of river and harbor improvements, by which the payment was ordered and directed to be made out of moneys of the United States and under his control as such officer.

For a proper consideration of this case it will not be out of place to refer to its previous history:

Oberlin M. Carter, a captain of the Corps of Engineers of the United States Army, was brought to trial in January, 1898, before a general court-martial, legally convened by the President of the United States, upon charges and specifications set out in full in General Orders, No. 172, Headquarters of the Army, Adjutant-General's Office, Washington, D. C., dated September 29, 1899, and hereinbefore referred to. The trial took place at Savannah, Ga., and New York City, consuming a number of months, and was not finished until some time in May, 1898. As required by existing regulations and statutes, the record of the proceedings was submitted to the Secretary of War for the action of the President of the United States, but before being submitted to the latter, and after having passed through the hands of the Judge-Advocate-General of the Army, it was referred to the Attorney-General of the United States, who, on the 29th of September, 1899, one year

and four months after the conclusion of the trial by the court-martial, laid the whole proceedings before the President, with his opinion thereon, in which he recommended the action to be taken, which appears on the thirty-sixth page of said orders, No. 172, above cited, and part of the return in this case, Record, page 76, folio 1447.

Carter being in custody under the sentence of the court as approved by the President, he was on the 6th of October, 1899, brought before the circuit court of the United States for the southern district of New York, upon a writ of habeas corpus issuing out of that court, as a result of the petition of Abram J. Rose, his attorney.

Due return having been made to this writ and a full hearing having been had, it was discharged on the 23d of October, 1899, and the prisoner remanded to the custody from whence he was taken. At the same time a petition for an appeal to the circuit court of appeals for the second circuit from the order discharging the writ was presented and allowed. (See *In re Carter*, 97 Fed. Rep., 496; record, pages 85 to 90, folio 1800 to 1888.)

The appeal was duly heard, all arguments and briefs having been submitted, and on the 24th day of January, 1900, Judge Wallace, speaking for the circuit court of appeals for the second circuit, announced the judgment of that court, affirming the order dismissing the writ of habeas corpus with costs. (See 99 Fed. Rep., 948, record pages 97 to 100, folios 1820 to 1826.)

Before the mandate of the aforesaid court could be procured under its rules, the petitioner presented, on February 5, 1900, an application to this court for a writ of certiorari to the circuit court of appeals for the second circuit. This application was denied on the 26th of February, 1900, but no opinion rendered. (See 176 U. S., 684.)

On the same day an appeal from the final order of the circuit court for the southern district of New York, directly to this court, was allowed by Judge Lacombe, before whom the original hearing had taken place, as also a writ of error.

This court, upon the motions to dismiss or affirm submitted by the Solicitor-General of the United States on behalf of the appellee and defendant in error on April 23, 1900, dismissed the said appeal and writ of error. (See *Carter* v. *Roberts*, 177 U. S., 496.) And upon issuance of a mandate of the circuit court, southern district of New York, the prisoner was sent to the place designated under his sentence, namely, the United States penitentiary at Fort Leavenworth, Kans.

On the 17th day of October, 1900, said Oberlin M. Carter, through I. Stanton Carter, applied to the United States circuit court for the district of Kansas for a writ of habeas corpus, which was allowed. Due return thereto having been made and the prisoner produced on November 23, 1900, the case was heard "upon petitioner's oral motion to discharge said Carter, based upon the averments of respondent's return, no

evidence having been offered or considered by the court." (Record, p. 108, folio 2123.) On December 10, 1900, the writ was discharged and the prisoner remanded to the custody from whence he was produced. (Record, p. 108, folio 2123.) (See also opinion of court in this case, Record p. 102 to 108, folios 2114 to 2122, and *Carter* v. *McClaughry*, 105 Fed. Rep., 614.) An appeal from the said order and judgment to this court was allowed on December 10, 1900. (See Record, p. 109, folio 2124.)

The attorney for appellant on page 5 of his brief makes the surprising statement that under the pleadings of the case in the lower court certain matters were admitted, and that among them the respondent admitted as follows:

> That there was no evidence adduced before the court-martial tending to show any guilt on the part of said Carter. That the evidence before the court-martial showed that the money paid out by Carter, as alleged in the specification to Charge IV, was paid by him under and in accordance with the specifications of two certain contracts between the United States of America and the Atlantic Contracting Company, dated September 8, A. D. 1896, for the improvement of Savannah Harbor and Cumberland Sound, respectively, which said contracts were entered into pursuant to the act of Congress approved June 3, 1896.
>
> That under the act of Congress approved September 27, 1890, the President, by an order dated March 20, 1895, fixed the maximum punishment for a violation by an enlisted man of

the United States Army of the sixtieth article of war, and also for a violation by such person of the sixty-second article of war by embezzlement of more than $100, at a term of four years' confinement at hard labor under each article. That the President also promulgated on October 31, 1895, certain army regulations, and among them "Article 938. Whenever by any of the Articles of War, punishment is left to the discretion of the court, it shall not, in time of peace, be in excess of a limit which the President may prescribe. The limits so prescribed are set forth in the manual for courts-martial, published by the authority of the Secretary of War."

That the limits above mentioned are the limits prescribed in said manual, and article 938 above set out was in force when said court-martial passed sentence on said Carter.

The claim that any admissions were made on the part of respondent is wholly erroneous; no allegation of any kind recited in the petition for the writ purporting to impeach the legality of the court-martial proceedings or the sentence was admitted by the respondent in his return, and no such admissions can be deduced from the pleadings as of record before the court. The respondent, with his return, submitted in evidence the full record of the proceedings under which the petitioner was held,-viz, General Orders, No. 172, and he particularly averred in connection therewith "that the said Carter has been lawfully convicted and sentenced by the said general court-martial which

had jurisdiction of the person of the said Carter and of the various offenses for which he was tried." (Record, p. 48, folio 62.) The respondent also resisted, in his return, the admission by the court below of any evidence for the purpose of retrying the issue of facts determined by the court-martial, for the court below had no power to inquire whether the evidence was sufficient to sustain the conviction. (Record, p. 50, folios 64 to 65.)

And in the conclusion of this return the respondent, for the reasons set forth, prayed the court to dismiss the said writ. (Record, p. 50, folio 65.)

It will thus be seen that all the various allegations of the petitioner set out by him and claiming the release of the prisoner from his imprisonment on account of the illegality of the latter have been most emphatically denied in the return and by the record produced showing the trial, conviction, and sentence. Moreover, in the brief for respondent every one of the said allegations of the petitioner are specifically denied, most strongly contested, and controverted.

The action of the court below, as shown by its decree and opinion, further negatives the extraordinary claim of the appellant's attorney in these particulars.

The attorney for the appellant is further in error when he says, on page 5 of his brief:

> To this return the petitioner demurred. The record in the case, page 108, shows 'said case came on for a hearing upon petitioner's oral motion to discharge the said Oberlin M. Carter, based upon the averments of respondent's re-

turn, no evidence having been offered or considered by the court.'

It is conceded that the effect of a motion to discharge has the same effect as a demurrer, for by that motion the return is conceded to be true.

Under the circumstances the simple issue of law arose as to the sufficiency of the return.

Church on Habeas Corpus, second edition, page 160, in relation to the subject under discussion, says:

> The return of a writ of habeas corpus imports verity until it is impeached, and when made * * * by a public officer, in his official capacity, the facts therein stated will be taken as true, without reference to the allegations in the petition unless an issue as to these facts is raised by an appropriate pleading on the part of the petitioner. This pleading is usually in the form of an answer denying the allegations of the return. The return should be responsive to the writ, and not to the petition upon which it is based. And when the return sets out in full the record of the proceedings under which the prisoner is held it is a full and complete answer to every allegation contained in the petitioner's application for his discharge, and being admitted as true negatives the same.

And in paragraph 169 of the same work it is stated:

> The sufficiency of the return in law may be tested on a motion to discharge the prisoner, and the motion has the effect of a demurrer * * * on a motion to discharge the facts stated * * * in the return are conceded to

be true. On a motion to discharge the prisoner the sufficiency of the return alone is examined.

The appellant's attorney concedes at the outset that the application for the writ of habeas corpus can not be used as a substitute for a writ of error, and he admits that no mere error or irregularity in the proceedings of the court-martial can be taken advantage of in this appeal. And further, that unless he can convince this court that the military tribunal acted beyond its power in such manner as to render its sentence void, in whole or in part, this proceeding must fail; the court-martial must have exceeded its jurisdiction somewhere along the line or applicant can not prevail.

But notwithstanding these declarations the attorney for appellant persists in basing his contentions upon alleged errors of the court-martial that certain specifications did not support the charge; that the evidence did not justify conviction; that certain findings were void; that although there are four separate charges only two separate crimes were in reality charged; that therefore the appellant was put in jeopardy for the same offense more than once.

All these are matters of defense which were within the jurisdiction of the trial court and should have been submitted to it in appropriate pleas for its decision, and if they had been so submitted and determined adversely to the prisoner they might have been brought as errors before the reviewing officer by way of appeal; but they can have no standing or consideration in a habeas corpus proceeding, as will be shown hereinafter.

It is to be remembered that in his petition to the

court below and in his brief before this court the appellant does not specifically deny the jurisdiction of the court-martial over the offender or the offenses, and in point of fact concedes the legality of so much of the sentence as imposed fine and publication of the offense, but maintains that the remainder of the sentence is illegal for the reasons alleged in the petition.

Before proceeding to the discussion of the questions at issue in the case it is deemed proper to invite attention to the fact that the brief of appellant does not contain an assignment of errors, but instead (p. 15) he gives a so-called "specification of errors." A comparison of this specification with the asssignment of errors (Record, pp. 109 and 111, folios 2125–2129), upon which the appeal in this case was granted, shows that the former are not wholly responsive to the latter and that they differ in several particulars. The second assignment of errors and the first additional and amended assignment of errors are wholly omitted; in the former it is alleged that the sentence of imprisonment is void because the court-martial had no power to inflict the same under the sixtieth article of war, and the latter avers that the sentence imposed is in violation of the one hundred and second article of war, Carter having by said sentence been twice punished for the same offense.

Attention is invited to this discrepancy, because the consideration of at least the latter error has an important bearing upon the point whether there is any constitutional question at all at issue in this case or was decided by the court so as to sustain this appeal.

After first considering the principle of law which, it is believed, should govern this court in its action upon the case, it is proposed to take up in their order the points discussed in the brief of the appellant.

ARGUMENT.

POINT I.

The court-martial which tried, convicted, and sentenced the petitioner, being a lawfully constituted court, the proceedings thereof could be reviewed by the circuit court for the following purposes only: (1) To ascertain whether said court had jurisdiction of the person and the subject-matter; (2) whether the judgment rendered and the sentence imposed were such as the court had power to render and impose under the law.

The Constitution of the United States provides in section 8, Article I, that Congress shall have the power to make rules for the government and regulation of the land and naval forces of the United States. Pursuant to such power, Congress, by statute, enacts rules for the government and regulation of the Army, known as Articles of War. Section 1342, Revised Statutes, Article I of said section, provides: "That every officer, before he enters upon the duties of his office, must subscribe to the said rules and articles." The force and effect of an officer of the Army subscribing to said rules is to place himself directly within the power of courts-martial to try and determine any offense which he may have committed in contravention of the Articles of War, and take from him the privilege, which he otherwise would have, of having trial for all offenses that might be charged against him instituted

in the civil courts for the proper State and district. (*Ex parte Milligan*, 71 U. S., 123.)

When therefore a court-martial has been instituted for the purpose of trying any person in the military establishment for any offense and that offense is shown to have been perpetrated while the party is subject to the rules and regulations of the Army, then it must be conceded that the court has full jurisdiction and power to arraign, try, and sentence the party, pursuant to the provisions of said Articles of War, and that power is as inherent and inviolable in that court as the power of any civil tribunal to arraign, try, and sentence any person for an offense committed against the laws of the United States of which it has cognizance. In other words, courts-martial as independent tribunals have as complete power and authority to judicially and finally determine any cause before them over which they have jurisdiction as any other court under the Constitution and laws of the United States. It follows, therefore, that full credence to their conclusions must be given by all tribunals, and it appearing from the record in this case that the appellant was an officer of the United States Army, it must be conceded that the court-martial which tried him had full power to judicially try and determine the charges and specifications with which he was charged, especially so when the record shows that the charges and specifications set forth offenses which he is alleged to have committed while a commissioned officer in the Army of the United States.

The civil courts in passing upon the power of courts-martial to judicially determine offenses in violation of the Articles of War have uniformly held that the power of that court to arrive at a final determination is as inherent as that of any court constituted under the Constitution and acts of Congress.

In *Ex parte Davison* (21 Fed. Rep., 620), Judge Wallace, discussing the power of courts-martial, says:

> Courts-martial are lawful tribunals existing by the same authority that this court is created by, have plenary jurisdiction over offenses by the law military as this court over controversies committed to its cognizance, and within their special and more limited sphere are entitled to ask untrammeled an exercise of their powers.

In *Ex parte Reed* (100 U. S., 13), which appertains to the use of the writ of habeas corpus to review the proceedings of a naval court-martial, the court held:

> That court had jurisdiction over the person and the case. It is the organism provided by law, and clothed with the duty of administering justice in this class of cases. * * * Its judgments, when approved as required, rest on the same basis and are surrounded by the same consideration which give conclusiveness to the judgment of other legal tribunals, including as well the lowest as the highest under like circumstances.

In *Re McVey* (23 Fed. Rep., 879) it is held:

> It is not denied that within the sphere of their jurisdiction the judgments or sentences of mili-

tary courts are as final and conclusive as those of civil tribunals of last resort.

To have enabled the court below, therefore, to inquire into the proceedings of the court-martial herein by means of the writ of habeas corpus it must be considered that such inquiry by means of the writ of habeas corpus is for the purpose of ascertaining for what cause the prisoner was restrained of his liberty (752 Revised Statutes), for unless it proceeded upon the theory that he was restrained of his liberty in violation of the laws of the United States, no jurisdiction in the court below for such inquiry under any pretext could be claimed.

The circuit court could only review the proceedings of the court-martial for the purpose of ascertaining two things: First, whether the court had jurisdiction of the persons of the petitioner and the subject-matter of the offenses; second, whether having such jurisdiction and having arrived at its conclusions the sentence which it imposed was one which it was warranted in imposing by virtue of law. So far the circuit court could go in its inquiry and no further.

As a proposition of law it can not be claimed by the appellant that such an inquiry by means of a collateral proceeding could extend further than this; and not one case can be cited by him extending the power of inquiry by writ of habeas corpus beyond this contention.

If, therefore, upon the face of the proceedings it appears that the court-martial had jurisdiction, as before

stated, and then imposed a sentence which it could legally impose, the circuit court's inquiry necessarily ended, and it was justified in discharging the writ and remanding the prisoner.

The court-martial as a legally constituted court having the proper jurisdiction, had the right to determine for itself the procedure under the Articles of War.

It had the right to determine whether the respective charges and specifications were properly pleaded and whether or not the evidence submitted upon the trial warranted the conviction under one charge or another, and it having thus determined for itself its conclusions can in no wise be reviewed, except by a court erected with appellate power in the premises, and such appellate power can not be claimed for a court which simply reviews by means of the power of habeas corpus.

It has uniformly been held that a writ of habeas corpus does not possess the functions of a writ of error, whereunder upon a proper bill of exceptions, the errors in the pleadings, at the trial or in the judgment, may be reviewed.

In *Ex parte Tobias Watkins* (3 Pet., 193; Marshall, J.), it was held:

> That the question of whether an offense was committed—that is, whether the indictment did or not show that an offense had been committed—was a question which the district court was competent to decide. If its judgment was erroneous, still it is a judgment and until reviewed can not be disregarded.

In *Re McVey* (23 Fed. Rep., 879) the court said:

> The only authority of the civil courts is to answer whether the military authorities are proceeding regularly within their jurisdiction. If they are, we can not interfere, no matter what errors may be committed in the case of a lawful jurisdiction.

In *Dynes* v. *Hoover* (20 How., 81), was held:

> Of the sentence of courts-martial which have been convened regularly and have proceeded legally and by which punishments are directed, not forbidden by law, or which are according to the customs of the sea, civil courts have nothing to do, nor are they in any way alterable by them.

See also *Ex parte Reed* (100 U. S., 23).

In *Ex parte Yarbrough* (110 U. S., 631) this court said, after passing upon the question of the court's right to inquire into the jurisdiction:

> It is, however, to be carefully observed that this latter principle does not authorize the court to convert the writ of habeas corpus into a writ of error by which errors of the law committed by the court that passed the sentence may be reviewed here, for if that court had jurisdiction of the party and of the offense for which he was tried, and has not exceeded its powers in the sentence which it pronounces, this court can inquire no further.

See also *Keyes* v. *The United States* (109 U. S., 336).

To the same effect it was held in *Ex parte Siebold* (100 U. S., 375):

> That a writ of habeas corpus could not be used as a mere writ of error.

In the case of the *United States* against *Grimley* (137 U. S., 147), arising under a habeas-corpus proceeding and involving the jurisdiction of a court-martial, this court held:

> It can not be doubted that the civil courts may in any case inquire into the jurisdiction of a court-martial, and, if it appears that the party condemned was not amenable to its jurisdiction, may discharge him from the sentence; and, on the other hand, it is equally clear that by habeas corpus the civil courts exercise no supervisory or correcting power over the proceedings of the court-martial and that no mere errors in their proceedings are open to consideration. The single inquiry is jurisdiction. That being established, the habeas corpus must be denied and the prisoner remanded. That wanting, it must be sustained and the prisoner discharged.

This brings us, therefore, to the second consideration—as to whether the sentence imposed was one which the court could legally impose.

To entitle this court to overthrow the sentence imposed by the court-martial it would have to be shown that the sentence imposed was not merely erroneous or voidable, but so far erroneous as to be absolutely void or a nullity ab initio.

In other words, the inquiry would naturally relegate

the question back again to a jurisdictional consideration.

In *United States* v. *Pridgeon* (153 U. S., 59), it was held:

> Habeas corpus proceedings being a collateral attack of a civil nature, it must clearly and affirmatively appear that the indictment charged an offense over which the court had no jurisdiction, so that its sentence was void, or, in other words, the indictment must be so fatally defective on its face as to be open to collateral attack after trial and conviction, or that the sentence that the court pronounced thereon was void.

Eliminating from the appellant's brief those contentions which claim the sentence void by reason of a departure by the court-martial from the rules of procedure prescribed by the statute, the gist of the complaint is that the court had no power to impose a sentence of fine and imprisonment, because although the appellant was found guilty of embezzlement as defined by section 5488 of the Revised Statutes, in violation of the sixty-second article of war, and although under that charge and in pursuance to that article fine and imprisonment could be imposed, yet the offense as set forth under Charge IV showed it to be directly within the provision of the sixtieth article of war and should, therefore, have been properly triable thereunder, making the fine thereunder void and punishment on account of the same illegal, and that the sentence provided under said article 60—that is to say, fine or imprisonment—only could be imposed.

It will not be attempted under this point to specifically answer such contentions, but they are alluded to for the purpose of showing that under the proposition that the sentence must not merely be erroneous, but absolutely void, and therefore, going to the jurisdiction of the court to impose it, that the circuit court in reviewing under the writ of habeas had no right to take upon itself the burden of disturbing the sentence, if it appears from the record that the prisoner had been found guilty under any article of war, under which an offense was charged and under which the sentence of fine and imprisonment could be imposed, and that court could not constitute itself a court of appeals to determine under which charge the prisoner should have been tried, nor under which article the sentence should have been imposed, provided either or any article set forth empowered the court to impose the sentence that was imposed.

Bearing in mind that to be attacked collaterally the proceeding and sentence of the court-martial must be shown to lack the necessary jurisdictional requisites, it will be seen that, if such requisites appear in conformance with the contention and authorities above cited, a complete general answer has been made to Points I and II of appellant's brief.

A summary of the points in the petition of the petitioner amounts to this: That the evidence adduced before the court-martial did not show that any crime whatever had been committed, and that consequently, in imposing the sentence, the court acted beyond its

jurisdiction; that the evidence and specifications under the fourth charge show that the two sums of money alleged to have been paid out "for a purpose not authorized by law" were legally paid out by Carter; that the facts set out in this specification to the fourth charge, if justifiable at all, were not cognizable under the sixty-second article of war, but should have been brought under the sixtieth article of war; that the evidence and the charges with the specifications under them showed that the payment by the said Carter of the two checks mentioned in the said specifications were the only basis of the four charges in this case; the single act of drawing the said two checks have been carved up into four distinct and different crimes; that the facts set out under Charges I, II, and IV brought the offenses therein described under the sixtieth article of war, under which the said court-martial had jurisdiction only to inflict a fine or imprisonment or some other punishment in the alternative, but not cumulatively.

It is respectfully submitted that, if such contentions have any force, they would constitute error merely on the part of the trial court, which could have been taken advantage of by the requisite and appropriate motions, and if dissatisfied with the rulings thereon, to ask that such errors be corrected when the case came up for review by the reviewing officer designated in the statute, namely, the President of the United States.

If the trial court had jurisdiction, it was competent to decide under which charge the accused should be

tried; whether an offense under the facts lay under article 60 or 62, and whether or not the evidence submitted warranted conviction; in fine, to proceed duly to determine upon the evidence adduced the guilt or innocence of the prisoner. The decision of the trial court upon these matters could not be reviewed collaterally by the court below, nor can it be so reviewed by any other court. The authorities are uniform in holding that the trial court must of itself determine the sufficiency of the charges and specifications before it and of the evidence adduced in their support.

In *Dynes* v. *Hoover* (*supra*) it is expressly held:

> It is in the nature of an appeal to the officer ordering the court, who is made by the law the arbiter of the legality and propriety of the court's sentence, and when such sentence is confirmed it is beyond the jurisdiction or inquiry of any civil tribunal whatsoever, unless it shall be shown that the court had no jurisdiction, or in which, having jurisdiction, it has failed to observe the rules prescribed by the statute for its exercise. * * *
>
> With the sentences of courts-martial which have been convened legally and by which punishments are directed, not forbidden by law, or which are according to the laws and customs of the sea, civil courts have nothing to do, nor are they in any way alterable by them. If it were otherwise the civil courts would virtually administer the Rules and Articles of War, irrespective of those to whom that duty and obligation has been confided by the laws of the

> United States, from whose decision no appeal or jurisdiction of any kind has been given to the civil magistrate or civil courts.

In *Ex parte Parks* (93 U. S., 18) it was contended that the facts constituting an alleged forgery, set forth in an indictment, did not constitute a crime by any act of Congress, and that, as the United States had no common law jurisdiction of crimes, it therefore had no jurisdiction to try him for that offense. Justice Bradley, writing the opinion, says:

> But the question whether it was or was not a crime within the statute was one which the district court was competent to decide. It was before the court and within its jurisdiction. No other court except the circuit court for the same district having concurrent jurisdiction was as competent to decide the question as the district court. * * * Whether an act charged in an indictment is or is not a crime by the law which the court administers is a question which has to be met at almost every stage of criminal proceedings on motion to quash the indictment, on demurrers, on motions in arrest of judgment, etc. The court may err when it has jurisdiction of the question. If it errs there is no remedy after final judgment, unless a writ of error lies to some superior court. * * * Now it has been held that a mere error in point of law committed by a court in a case properly subject to its cognizance can only be reviewed by the ordinary methods of appeal, or writ of error, but that where the proceedings are not only erroneous but entirely void—as

> where the court is without jurisdiction of the person or of the cause, and a party is subjected to illegal imprisonment in consequence—a superior court or judge vested with the prerogative power of issuing a habeas corpus may review the proceedings by that writ and discharge from illegal imprisonment. * * * But in the case before us the district court had plenary jurisdiction both of the person, the place, the cause, and everything about it. To review that decison of that court by means of the writ of habeas corpus would be to convert that writ into a mere writ of error, and to assume an appellate power which has never been conferred upon this court.

In *Swaim* v. *The United States* (165 U. S., 561) it was, among other things, urged that no offense under the sixty-second article was shown by the facts to have been perpetrated by the petitioner, and that the Court of Claims should have so found and held the sentence void. The court said:

> If this position were well taken it would throw upon the civil courts the duty of considering all the evidence adduced before the courts-martial to determine whether the accused was guilty of conduct prejudicial to good order and military discipline, in violation of the Articles of War; but, as the authorities heretofore show, this is the very matter that falls within the province of courts-martial in respect to which their conclusions can not be controlled or reviewed by civil courts.

In re Bogart (2 Sawyer, 396) it appears that Bogart, a clerk to a paymaster of the United States

Navy, was charged before a court-martial with the crime of embezzlement, desertion, etc. Among other defenses the prisoner pleaded in bar a former trial and conviction on the same state of facts, and also set up the statute of limitation. The court, among other things, said:

> If the court-martial has jurisdiction to try the offense charged, then the prisoner is lawfully held for trial. All else relates to the exercise of jurisdiction with which this court can not interfere. We can not enter into any examination of the merits of the charges. * * * Has the court-martial ordered the power to hear and decide upon the charges and specifications made by the Secretary of the Navy? If so, that ends our inquiry. As to the alleged former conviction and the bar of the statute of limitations, these are matters of defense, and are questions for the tribunal having jurisdiction to try the charge.

In re White (17 Fed. Rep., 724), the petitioner was arrested on a charge of desertion for trial before a court-martial. Among other defenses he interposed that of the bar raised by the statute of limitation. The court said:

> The jurisdiction is clearly conferred upon the courts-martial and it is exclusive. This covers the whole ground. Jurisdiction to determine whether a party is guilty of the offense necessarily involves the jurisdiction to determine what constitutes the offense under the statute;

that is to say, jurisdiction to construe the statute and to adjudge it, etc. * * * If the military authorities proceed regularly within their jurisdiction, we can not interfere, no matter what errors may be committed in the excess of its lawful jurisdiction.

* * * Whether it makes error in its proceedings is immaterial, inasmuch as this court has no jurisdiction to review and correct those errors directly or by indirection through a writ of habeas corpus. * * * It is enough for us that whether the offense is the same is a question to be decided upon a plea of former acquittal, and that this question was actually decided by a court which was competent to entertain it. If its decision was erroneous, we have no power to review that error.

See also *Ex parte Yarbrough* (110 U. S., 654).

In re Eckart (166 U. S., 482) it was held:

That a trial court possessing general jurisdiction of the class of offenses within which is embraced the crime set forth in the indictment is possessed of authority to determine the sufficiency of the indictment, and that in adjudging it to be sufficient it acts within its jurisdiction, and a conviction and judgment thereunder can not be questioned upon habeas corpus because of a lack of certainty or other defect in the indictment of the facts averred to constitute a crime.

In the case of *Rose ex rel. Carter, appellant*, v. *Roberts, appellee*, which has heretofore been referred to in this case, and the opinion in which has been made part of

the return, Judge Wallace, in speaking for the circuit court of appeals, second circuit, held:

> It is not the office of a writ of habeas corpus to perform the functions of a writ of error in reviewing the judgment of a court-martial. Courts-martial are tribunals created by Congress in pursuance of the power conferred by the Constitution, and have as plenary jurisdiction of offenses committed to them by the law military as do the circuit and district courts of the United States in the exercise of their statutory powers over other offenses. The question of jurisdiction may be reached by such a writ as it may be when the judgment of the tribunal is attacked; but the range and scope of the inquiry is controlled by the same rules and limitations in either case. There must be jurisdiction to hear and determine and to render the particular judgment or sentence imposed; but if this exists, however erroneous the proceedings may be, they can not be reviewed collaterally or redressed by habeas corpus. These principles have been repeatedly declared by the authorities. *In re Davidson* (21 Fed. Rep., 618); *ex parte Reed* (100 U. S., 13); *in re Coy* (127 U. S., 651); *United States* v. *Pridgeon* (153 U. S., 59).

When the case just quoted came before this court for decision upon the motions to dismiss or affirm, Mr. Chief Justice Fuller, in speaking for the court, held:

> The eighth section of Article I of the Constitution provides that the Congress shall have power to make rules for the government and regulation of the land and naval forces, and in

> the exercise of that power Congress has enacted rules for the regulation of the Army known as the Articles of War (Revised Statutes, section 1342). Every officer, before he enters on the duties of his office, subscribes to these articles and places himself within the power of courts-martial to pass on any offense which he may have committed in contravention of them. Courts-martial are lawful tribunals, with authority to finally determine any case over which they have jurisdiction, and their proceedings, when confirmed as provided, are not open to review by the civil tribunal, except for the purpose of ascertaining whether the military court had jurisdiction of the person and subject-matter and whether, though having such jurisdiction, it had exceeded its power in the sentence pronounced. (177 U. S., 498.)

In discharging the writ of habeas corpus in this case the court below in its opinion stated in part (see Record, p. 104, folio 2116, 2117):

> The limited scope of inquiry in a case of this character is well defined by many decisions. A writ of habeas corpus can not be converted into a proceeding in error. A court to which an application is made for the discharge of one restrained of his liberty pursuant to the judgment and sentence of another court can not inquire whether the evidence was sufficient to warrant conviction, nor consider whether in the progress of the trial errors were committed by the trial court as to matters within its jurisdiction. In such a case the writ of habeas corpus is in effect a collateral attack, and if the court pronouncing

the sentence had jurisdiction of the accused and of the offense for which he was on trial did not exceed its jurisdiction in the imposition of the sentence the case is not open to further inquiry. Courts-martial are independent tribunals created by the same authority to which this court owes its existence and they have as complete power and jurisdiction to judicially determine any cause before them involving offenses under the Articles of War as this court has over controversies committed by law to its cognizance. The limitations on the power of this court to inquire into matters connected with the judgments of other civil courts, by means of the writ of habeas corpus, apply with equal force to the judgments of courts-martial. This consideration is sufficient to eliminate a number of petitioner's objections without further discussion.

In the light, then, of the foregoing authorities, when applied to the allegations made, it is quite clear that counsel for petitioner sought in the court below to convert the writ of habeas corpus into a writ of error, and judging from his brief persisted in doing the same thing in this court. If the authorities referred to clearly decide any question at all, it is that the courts-martial alone could determine under what articles of the Articles of War the accused should be tried; that it was solely within its province to hear and determine the question whether the accused is guilty of any of the offenses created by the Articles of War, and to impose such penalties as the respective articles warranted, and its decision with regard thereto

could not be reviewed by the court below, nor can this be accomplished by an appeal to this court.

This, then, brings us down to a special consideration of the respective points raised in appellant's brief.

POINT II.

The finding of "guilty" under charge four and its specification was not beyond the legal powers of the court-martial, and not illegal and void, for this charge and its specification set out an offense of which the court-martial had jurisdiction, and its findings thereon can, therefore, not be reviewed by or attacked under the proceedings upon the writ of habeas corpus.

A.—THE SPECIFICATION WAS NOT WRONGLY LAID UNDER THE SIXTY-SECOND ARTICLE OF WAR, BUT SETS OUT AN OFFENSE UNDER THAT ARTICLE.

Under article 62, an officer of the military establishment who has been intrusted with funds of the United States, as disbursing officer, for the purpose of disbursement, can be tried by court-martial for embezzlement if he * * * unlawfully withdraws from the treasurer or any assistant treasurer, or any authorized depository, or unlawfully transfers, or for any purpose not prescribed by law transfers or applies any portion of the public money intrusted to him, for this is an offense created by section 5488, Revised Statutes.

Section 5488 provides that: "Every disbursing officer of the United States, who deposits any public moneys intrusted to him in any place or in any manner, or converts it to his own use in any way whatever, or loans with or without interest, or for any

purpose not prescribed by law, withdraws from the treasurer or any assistant treasurer, or any authorized depository, or for any purpose not prescribed by law, transfers or applies any portion of the public funds intrusted to him, is in every such act deemed guilty of embezzlement of the money so deposited, converted, loaned, withdrawn, transferred, or applied, and shall be punished by imprisonment with hard labor for a term of not less than one year nor more than ten years, or by a fine of not more than the amount embezzled or less than $1,000, or both such fines and imprisonment."

The sixty-second article of war reads as follows:

> All crimes not capital, and all disorders and negligences which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing Articles of War, are to be taken cognizance of by a general * * * court-martial, according to the nature of the offense, and punished at the discretion of such court.

The charge in this particular recites "Embezzlement as defined in section 5488, Revised Statutes of the United States, in violation of the sixty-second article of war," and the gist of the specification is that Oberlin M. Carter, captain of engineers, as a disbursing officer, being intrusted with large amounts of public money for river and harbor purposes, did apply for a purpose not prescribed by law certain amounts of the funds so intrusted to him; that is to say, that upon false accounts he withdrew certain moneys of the United

States, illegally from the authorized depository. The statement that the accounts so paid were false, the amounts not being due or owing from the United States to the parties paid, or to anyone, is descriptive of the grounds upon which the accusation of unlawful application is based.

The face of the specification of which the accused officer was convicted clearly avers that he was in the performance of his duty as a disbursing officer. It follows, therefore, that the act committed directly offended against the military state. The specification supports the charge, and taken together clearly aver a military offense. There being power to hear and determine the case, the finding of the court is legal and thus no jurisdictional question arises, and the finding can not be attacked in a collateral proceeding.

The circuit court of appeals, second circuit, in passing upon the very questions herein discussed (see Record, p. 99, folio 1823), says:

> The record presents the charges and specifications upon which he was found guilty of those offenses. The charges describe each offense in the language of the article. Whether the specifications support the charges or the evidence supports the specifications we are not at liberty to answer. When properly constituted and convened a court-martial has jurisdiction to hear and determine the question whether the accused is guilty of any of the offenses created by the Articles of War. This jurisdiction necessarily includes the authority to decide when the

> charge against the accused is the commission of one or more of these offenses, whether the specifications and the evidence sufficiently exhibit the incriminating facts.

The court below in disposing of the contention of the petitioner as to the illegality of the findings under the sixty-second article of war, says on page 105, folio 2118, of the record:

> Were the facts set forth in the specification to the fourth charge sufficient to constitute the offense charged, and was the conduct described "to the prejudice of good order and military discipline" as required by the sixty-second article of war? The specification sets forth that Carter was a disbursing officer of the United States, and that as such officer he was intrusted with certain public money which he willfully and knowingly caused to be paid on false accounts, the accounts paid not being due or owing from the United States to the parties to whom the payments were made, of which Carter well knew. In my opinion this charges the application of public money to "a purpose not prescribed by law," and, with the details which the specification supplies, constitutes a sufficient indictment under section 5488, Revised Statutes. And it may also reasonably be contended that in a larger sense the misappropriation by a captain in the Engineer Corps of the Army of public money intrusted to him to be used in the construction of public works of which he has official charge is conduct to the prejudice of good order and military discipline.

In his brief the appellant has not advanced any facts, authorities, or arguments essentially differing from these upon which the foregoing opinion was rendered in the court below.

But in the face of this opinion and of the record in the case, the appellant still alleges in his brief, Point I and its subdivisions, that the findings under the charge are void, the specification being wrongly laid under the sixty-second article of war, because, as he claims, the moneys were applied to a purpose prescribed by law, that the offense charged was wrongly laid under the sixty-second article of war and was not an offense prejudicial to good order and military discipline, it being mentioned in a general article of war, and that the offense was covered by three distinct paragraphs of the sixtieth article of war.

All of these allegations are sought to be developed by the attorney of appellant into a state of facts to support the theory that all of them taken together raised questions jurisdictional in character. But a mere recital of them justifies the assertion that they amount to nothing more than allegations of errors by the court-martial in the exercise of its lawful jurisdiction.

Under these circumstances of the case the appellee is constrained to answer and contest the allegations, etc., made in the brief of the appellant, although in his opinion there is no merit in them.

a. The moneys were not applied to a purpose prescribed by law.

It is claimed by the appellant in his brief (p. 27) that the specification to the fourth charge affirmatively shows that the money mentioned therein was applied to a "purpose" mentioned by the law. He arrives at the peculiar conclusion by reason of the fact that the vouchers upon which the payment was based were marked, the one, "Appropriation for improving harbor of Savannah, Ga.," and the other, "Appropriation for improving Cumberland Sound, Georgia and Florida," and he says: "The necessary inference is that the appropriation was made by act of Congress for the purpose stated by accused on the voucher. If these vouchers were paid on the work done under an act of Congress, and from funds appropriated by such act for such improvements, then it follows they were paid out for a purpose prescribed by law."

This sort of treatment of the question is illegitimate, for it enters into the forbidden domain of retrying the issues before the trial court.

To add to the force of his peculiar assertion, the appellant adds that the matter is not left in doubt because of a certain allegation in this connection made in the petition for the writ of habeas corpus (see appellant's brief, p. 27), which "allegation was nowhere traversed in the return, and this is admitted by the pleadings to be true, and it is true in fact."

The appellant has already shown in the statement of his brief that this contention has no merit whatever

and is contradicted by the record in the case; consequently no further remarks thereon are deemed necessary.

Now, inasmuch as the record in this case, the only matter upon which the court can base its conclusions, namely, the specification to the fourth charge, clearly avers, and the court-martial so finds, that "the accounts on which the same (moneys) were paid being false, the amounts not being due or owing from the United States to the parties paid or to anyone else, and he, the said Captain Carter, well knowing this to be the case," how can it be said in the face of these facts that the payment was prescribed by law? Such an assertion virtually proclaims that an officer disbursing money appropriated by law is by the mere reason of such appropriation justified in applying it to the payment of a voucher which he knows to be false or upon which he has made a false certificate.

The question here raised by the appellant is not jurisdictional in character, but addresses itself to supposed errors or irregularities in the exercise of lawful jurisdiction determining the sufficiency of the pleading in question and the guilt of the accused under it upon the evidence adduced. It is but another attempt under the guise of specious reasoning, with the aid of foreign matter, to convert the writ of habeas corpus into a writ of error.

b. The offense set out in the specification was properly laid under the sixty-second article of war, because it is an offense "to the prejudice of good order and military discipline."

The converse of this proposition is held in a subdivision of Point I in appellant's brief (p. 29).

The article of war provides that "All crimes not capital and all disorders and neglects which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing Articles of War, are to be taken cognizance of by * * * court-martial * * * and punished at the discretion of the court." (Section 1342, Revised Statutes of the United States, article 62.)

First.—Definition and scope of the sixty-second article of war.

The Articles of War were not designed to be a complete penal code enumerating all the offenses of which officers and soldiers may be guilty. Some of the most common offenses are not specifically mentioned; for instance, officers being absent without leave, making false reports or false statements, or signing false certificates; and no specific article exists for the punishment in time of peace of the numerous offenses laid down in the fifty-eighth article of war, the provisions of which are limited to times of war. But the sixty-second article of war is comprehensive enough to supply this deficiency. In respect to the latter article, writers on military law have said:

> The Articles of War designate many offenses, such as murder, larceny, robbery, burglary,

arson, desertion, bribery, cowardice, drunkenness on duty, sleeping upon a post, disobedience of orders, disorderly conduct in quarters, irreverent conduct in church, profanity, etc. The legislative authority then gathers up the non-enumerated, indefinable offenses of military life and places them under the titles of "conduct unbecoming an officer and a gentleman," and "conduct prejudical to good order and military discipline."

That this is the well-understood purpose and effect of the Articles of War last referred to, all military writers agree. This provision, taken originally from the British military law, was in substance incorporated in our first code of 1775, and has similarly appeared in each subsequent issue of our Articles of War. As will be illustrated in construing its separate terms, its evident purpose was to provide for the trial and punishment of any and all military offenses not expressly made cognizable by courts-martial in the other and more specific articles, and thus to prevent the possibility of a failure of justice in the Army. In practice the greater number of the charges that are preferred against soldiers, and a large proportion of those preferred against officers, are based upon this the "general" article of the code. Wherever the offense committed is one not certainly or fully designated or described in some other particular article, or where, though so designated, no punishment is assigned for its commission, or where it is doubtful under which of the two or more articles the offender should be prosecuted, recourse is had to this comprehensive and serviceable

provision as the authority and foundation for the charges and proceedings. (Win., Mil. Law, vol. 1, p. 1035.)

Its policy is to provide a general remedy for a wrong which had not elsewhere been "provided for." (Sam, Mil. Law, pp. 288, 1816.)

There is scarce any impropriety of conduct or irregularity which an officer or soldier may commit that may not be brought under the seventieth article of war. (Kennedy, Mil. Law, p. 34, 1847.)

(This article is the English article of war from which the present sixty-second of the American articles was taken.)

The seventieth article of war is the most useful of the whole. (Napier, Remarks on Mil. Law, pp. 59, 1837.)

There are many offenses which the soldier and officer may commit and many omissions of which they may be guilty which it would be impossible to distinctly lay down in separate articles of war. * * * Hence it is that this article is resorted to under which the sins of commission and of omission are tried and punished. The punishments are discretionary. (Hough, Pres. in Mil. Law, pp. 270, 1855.)

Not being found in any specific article, but defined in that part of the Revised Statutes relating to official misconduct of disbursing officers of the United States, the offense set out in the fourth charge was properly laid under the sixty-second article of war, for it comes directly under the description of the crimes cognizable under that article, by reason of the fact that it was

arson, desertion, bribery, cowardice, drunkenness on duty, sleeping upon a post, disobedience of orders, disorderly conduct in quarters, irreverent conduct in church, profanity, etc. The legislative authority then gathers up the non-enumerated, indefinable offenses of military life and places them under the titles of "conduct unbecoming an officer and a gentleman," and "conduct prejudical to good order and military discipline."

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committed while on duty under circumstances directly offending against the government and discipline of the military state. (Man. for Courts-Martial, p. 70; 2d Win. Mil. Law, 1124.)

See also Judge Lacombe's opinion (*supra*) and opinion of circuit court for the district of Kansas in this case (*supra*).

Second.—The Articles of War govern the officer and soldier of the Army at all times.

The officers and soldiers of the United States are at all times and in all places govered by the Articles of War and subject to being tried by courts-martial. (Art. 64, sec. 1342, Rev. Stat.)

The obligations imposed by this article upon military persons follow them wherever they may go in the performance of their duty. (Davis's Mil. Law, 480.)

Every officer upon his appointment subscribes to the Rules and Articles of War. (Art. I, sec. 1342, Rev. Stat.)

By entrance into the military service the citizen becomes a soldier. His relations to the State and public are changed. He acquires a new status, with correlative rights and duties. He can not of his own volition throw off the garments he has once put on. His change of status renders him amenable to military jurisdiction. (*United States* v. *Grimley*, 137 U. S., 147.)

He relinquishes his right to trial by jury and surrenders during his service part of his civil rights.

Third.—The courts-martial, in the absence of positive enactment, are bound to regulate their mode of procedure by the customary military law.

In *Ex parte Henderson* (11 Fed. Cases, 349), partially quoted only in the brief on behalf of the appellant, the court said:

> Courts-martial are lawful tribunals existing by the same authority that other courts exist. Their jurisdiction, it is true, is limited and special, being confined to military persons charged with military offenses. Over such persons charged with offenses defined by military law their jurisdiction is complete. They are, indeed, liable to the controlling authority which the civil courts have at all times exercised of preventing them from exceeding the jurisdiction given to them * * *. In respect to persons subject to their authority and charged with offenses subject to their jurisdiction, the civil courts do not sit as a court of error to review the regularity of their proceedings. Informality, therefore, in the proceedings of courts-martial can not be remedied or inquired into by a civil court. The ground work of the jurisdiction and the extent of the powers of courts-martial are to be found in the articles of war * * *, but these articles do not alone constitute the military code. They are, for the most part, silent on all that related to the procedure of military tribunals to be organized by them. This procedure is founded upon the usage and customs of war, upon the regulations prescribed

> by the President, and upon the authority of Congress and upon old practices in the Army, as to all of which points common law judges have no opportunity, either from their law books or from the course of their experience, to inform themselves. It would, therefore, be most illogical, to say nothing of the impediments to military discipline which would thereby be interposed, to apply to the proceedings of courts-martial those rules which are applicable to another and different course of practice. (Lord Denman's Opinion in Re Poe, 5 B. & A., 688.)

Compare also to the same effect the extract from the opinion of Mr. Justice Perry in *Porrett's case*, approvingly quoted by the Supreme Court of the United States in the case of *Smith* v. *Whitney* (116 U. S., 167), to which there was added from Justice Story's statement in delivering the opinion of this court in *Martin* v. *Mott* (12 Wheat., 1935):

> That the law by which courts-martial were bound to execute their duties and regulate their mode of proceedings in the absence of positive enactment was general usage of the military service, or what may not unlikely be called the customary military law.

And the same court further approvingly quoted in *Smith* v. *Whitney* the statement of the court of king's bench that it would be extremely absurd to expect the same precision in a charge brought before a court-martial as was required to support a conviction by a justice of the peace (*In re Poe*, 5 B. & A., 681 and 688).

Congress has prescribed an oath for members of courts-martial, of which the following is a part:

> You, A. B., do swear that you will well and truly try and determine, according to evidence, the matter now before you, between the United States of America and the prisoner to be tried, and that you will duly administer justice, without partiality, favor or affection, according to the provisions of the rules and articles for the government of the armies of the United States, and if any doubt should arise, not explained by said articles, then according to your conscience, the best of your understanding and the custom of war in like cases. (Art. 84, sec. 1342, Rev. Stat.)

This is clearly a legislative recognition of the binding effect of the general usage in the military service referred to by Mr. Justice Story in his opinion.

Fourth.—It is the province of courts-martial to decide what constitutes conduct to the prejudice of good order and military discipline.

The question whether particular charges against an officer of the Army as "conduct to the prejudice of good order and military discipline" amount to that offense, and the question whether particular acts charged against an officer of the Army as "conduct unbecoming an officer and a gentleman" amount to that offense, are questions to be decided by courts-martial according to the military law by an exercise of their jurisdiction.

Clode's Mil. Law, 19.

Dawkins v. *Rokeby*, 4 Fos. & Fin., 831.

Grant v. *Gould*, 1 H. B., 100.
United States v. *Fletcher*, 148 U. S., 84.
Smith v. *Whitney*, 116 U. S., 178.
Martin v. *Mott*, 12 Wheat., 19.
Dynes v. *Hoover*, 20 How., 65.

In the most recent case upon this question, in which the illegality of conviction was claimed, and sentence by court-martial, under the sixty-second article of war, was sought to be set aside, the Supreme Court of the United States, in the case of *Swaim* v. *United States* (165 U. S., 561), said:

> It is strongly urged that no offense under the sixty-second article of war was shown by the facts, and that the Court of Claims should have so found and have held the sentence void. If this position were well taken, it would throw upon the civil courts the duty of considering all the evidence adduced before the courts-martial and of determining whether the accused was guilty of conduct to the prejudice of good order and military discipline in violation of the Articles of War.
>
> But, as the authorities heretofore cited show, this is the very matter that falls within the province of courts-martial, and in respect to which their conclusions can not be controlled or reviewed by the civil courts. As we said in *Smith* v. *Whitney* (116 U. S., 178), of questions not depending upon the construction of the statutes, but upon unwritten military law or usage, within the jurisdiction of courts-martial, military or naval officers, from their training and experience in the service, are more compe-

> tent judges than the courts of common law * * *. Under every system of military law for the government of either land or naval forces, the jurisdiction of courts-martial extends to the trial and punishment of acts of military or naval officers which tend to bring disgrace and reproach upon the service of which they are members, whether those acts are done in the performance of military duties, or in a civil position, or in a social relation, or in a private business.

In *U. S.* v. *Fletcher* (148 U. S., 84) similar observations are found.

In his discussion of this case the attorney of the appellant digresses by asserting that a court-martial was particularly unfit to try this case, the officers by their training and education not being prepared for the intelligent handling of such a case, and the so-called *archaic* procedure of courts-martial comes in for its share of adverse criticism.

It is to be remembered that according to the record the court-martial was presided over by Brigadier-General Otis and that the judge-advocate was Col. T. F. Barr, assistant judge-advocate-general—the former an officer of high standing, who studied and practiced law before his entrance into the Army, and the latter an officer of long service in the legal department of the Army and highly skilled in the profession of law. The remaining members of the court were officers of sterling character and reputation and wide experience. All of them had grown gray in the service of their country.

The code complained of is part of the law of the land and must be followed by the Army and the courts, and, although often amended, has practically been in force for more than a century; it has governed our Army in peace and in war, at home and abroad, in the midst of civilization and on the frontier, in warfare with savages and in the struggles with the trained soldiery of civilized nations. It served its purpose well in the greatest of modern civil wars and formed the rule of conduct for the Union and Confederate forces. It supplies that authority from above and requires that obedience from below which is necessary to "make up the soul of the army—in one word: Discipline." It may be ancient, but it still maintains the wholesome republican principle that although the civilian has become a soldier, he is not therefore absolved from obedience to the civil law of the land, but has taken upon himself a double amenability for his acts—a principle much modified in the new English procedure, never heard of in the Empires of Germany, Austria, and Russia, and not even realized in the so-called republican France.

B. THE CRIME CHARGED IN THE FOURTH CHARGE IS NOT "MENTIONED IN THE FOREGOING ARTICLES OF WAR," AND THEREFORE CHARGED UNDER THE SIXTY-SECOND ARTICLE OF WAR.

It is to be remarked at the outset that the language of the sixty-second article of war is broad enough to warrant the construction of the phrase "though not mentioned in the foregoing articles" as not one of a

restrictive character establishing a prohibitory and mandatory exclusion of those crimes, etc., mentioned from being tried under it, but rather permissive in its scope that all crimes not capital, etc., can be tried under this article, whether embraced "in the foregoing articles" or not. So that if a crime, etc., mentioned in any other article than the sixty-second article, was laid and tried under the latter article no jurisdictional question could arise making the sentence void. Error alone might be claimed.

a. The offense charged under the Sixty-second Article of War is not covered both by paragraph 1 and paragraph 4 of the Sixtieth Article of War.

It is claimed that the facts set out in the specification to the fourth charge are sufficient to bring them under the first and fourth subdivisions of the sixtieth article of war. These subdivisions read that any person in the military service (1) "who makes or causes to be made any claims against the United States, or any officer thereof, knowing such claim to be false or fraudulent; or (2) who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or against any officer thereof, makes or uses or procures, or advises the making or use of any writing or other paper, knowing the same to contain any false or fraudulent statement," shall on conviction thereof be punished, etc.

These claims are unfounded, the principal averments in the specfication under consideration being that, as a

disbursing officer of the United States, Oberlin M. Carter did apply to a purpose not authorized by law large sums of money by causing said moneys to be paid out by checks on false accounts, the payment being accomplished or executed by the drawing and delivering of checks which directed the payment to be made of the moneys of the United States. Or in other words, that he withdrew, by means of checks, from the authorized depository moneys for a purpose not authorized by law and applied the same to an unlawful purpose.

The matter of the false accounts is descriptive of the unlawful application; this application itself, coupled with the payment and withdrawal of the funds by checks, being the elements constituting the embezzlement defined in section 5488, Revised Statutes, while, on the other hand, (1) the making, or causing to be made, false claims against the Government, and (2) the making or using of any writing containing any false or fradulent statement for the purposes indicated, are the principal offenses laid down in subdivisions 1 and 4 of the sixtieth article of war; specific acts prohibited and entirely distinct from the prohibited acts, which, in section 5488, Revised Statutes, are constituted and designated as embezzlement.

In examining accusations arising in military procedure it is to be observed that: "The instrument in which a military offense against an accused person is set forth (corresponding to the indictment in criminal procedure) is called the charge. Unlike the indictment, however, the military charge is composed of two

parts, the charge proper in which the particular offense is alleged in general terms, and the specification in which, as its name applies, the facts constituting the offense charged are fully and sufficiently stated. An accusation against an officer or soldier not thus separated in form would be irregular and exceptional in our practice, and until amended would not be accepted as a proper basis for proceedings." (Davis Mil. Law, 69: 1 Win. Mil. Law, 187; Manual for Courts-Martial, 15.)

However inartificial a pleading may be, it will properly be held sufficient as a legal basis for a trial and sentence, provided that the charge and specifications taken together amount to a statement of a military offense, either under a specific article or under the general article, viz, the sixty-second. (Digest Opinions, Judge-Advocate-General, 225.)

A crime, etc., cognizable under the sixty-second article of war, may be charged either by its name simply, or by its name with the additional words, "To the prejudice of good order and military discipline," or as "Violation of the sixty-second article of war." It is immaterial in which form the charge is expressed, provided the specification sets forth facts constituting an act, *prima facie*, prejudicial to good order and military discipline. Whenever the charge and specification taken together make out a statement or an act clearly thus prejudicial, etc., the pleading will be regarded as substantially sufficient under the general article and will constitute a legal basis for conviction and sentence. (Digest, Judge-Advocate-General, p. 72.)

The rules of military practice are elastic. For instance, where a specific offense is charged (i. e., an offense made punishable by an article other than the sixty-second article of war) and the specification does not state facts constituting such specific offense, the pleading will be insufficient as a pleading of that offense. Legal effect may, however, be given to a pleading if the charge and specification taken together amount to an allegation of offense cognizable under the sixty-second article of war.

b. The offense set out in the specifications to charge 4 is not covered by paragraph 9 of Article 60, the money embezzled not being money intended for the military service, and the embezzlement found under the Sixty-second Article of War being an embezzlement different in character and essence from the embezzlement mentioned in the Sixtieth Article of War.

1. *The clause "furnished and intended for the military service of the United States" means supplied and designed for military purposes.*

Subdivision 9 of the sixtieth article of war reads: "Any person in the military service * * * who steals, embezzles, knowingly and willfully misappropriates, applies to his own use or benefit, or wrongfully or knowingly sells or disposes of, any ordnance, arms, equipments, ammunition, clothing, subsistence, stores, money, or other property of the United States, furnished or intended for the military service thereof, shall * * * be punished," etc. * * * And it is asserted by the appellant that this subdivision covers the

embezzlement of moneys appropriated for river and harbor improvements, because these works being carried out by the officers of the Engineer Corps, and the appropriations therefor are to be expended under the direction of the Secretary of War, the moneys, in contemplation of law, must be regarded as having been "furnished or intended for the military service."

In construing this section we must at the outset remember that penal statutes must be strictly construed. The office of the concluding clause, "furnished or intended for the military service," is of a restrictive character and designed to describe unmistakably the purpose for which the property mentioned is designed. This is confirmed by the fact that the same statute is the basis of the fourteenth article for the government of the Navy (sec. 1624, Rev. Stat.), where the concluding clause reads, "furnished and intended for the military or naval service thereof."

Five of the seven specially designated classes of property mentioned in the subdivision of the sixtieth article of war under discussion belong to that class known as military or warlike stores and used for military purposes. Indeed, this purpose is inferable from the very nature of that class of property itself. Coupling this fact with the concluding restrictive clause we can not attach to the word "money" mentioned any other or more extensive meaning than that attaching to the other property. The word "furnished" means "supplied," "provided;" and "intended" signifies "designed," "purposed." The words "military service"

when the article "the" is prefixed thereto become a collective noun, by which the land forces or the Army are frequently designated. Good writers make use of the term the "two services" in speaking of the Army and the Navy.

It follows from what has been said that the restrictive clause "furnished and intended for the military service" must be construed to mean "supplied" and "designed" for military purposes, viz, the Army. Appropriations of money are made for definite objects and purposes, and named and designated accordingly, and this irrespective of the medium or agency through which such objects and purposes are accomplished and the expenditures therefor made.

The fact, therefore, that money appropriated for river and harbor improvements is disbursed by an officer of the Army, and the work supervised by the only skilled engineer force in the service of the Government, does not authorize the conclusion that in contemplation of law these moneys become thereby funds furnished or intended for the military service of the United States.

The appellant contends that the collective noun "the military service" has a meaning equivalent to "the War Department." This is clearly an error, for the Department of War belongs to the civil establishment of the Government. Section 158 of the Revised Statutes of the United States enumerates the Executive Departments of the Government and among them "the Department of War," and section 214 of the

same statutes says: "There shall be at the seat of government an Executive Dpartment to be known as the Department of War, and a Secretary of War, who shall be at the head thereof." The remaining sections of that chapter prescribe the personnel of that Department and the duties pertaining thereto. While through this Department the military affairs of the Government are administered and controlled, the Department itself and its personnel proper do not in any way belong to the military service, or constitute a part of the same.

In the brief on behalf of the appellant many general appropriation acts passed prior to 1860 are cited to show that money for public improvements was appropriated in the act making appropriation for the Army. This was at a period of time when but little attention was paid to the classification of appropriations. If we consult any of the Treasury estimates submitted to Congress, we find that the moneys needed for harbor and river improvements are classed with the appropriations for the civil and not for the military establishment. The same estimate also includes the War Department in "The civil establishment," and the funds for the same are invariably appropriated in the act making appropriations for the civil expenses of the Government.

In concluding this subpoint, attention is invited to the fact that Judge Lacombe, in dismissing the writ of habeas corpus in the case of O. M. Carter, distinctly held that the funds mentioned in the specification to the fourth charge were "not furnished or intended for the military service," and that the offense clearly falls

within the language of section 5488 of the Revised Statutes, and is therefore covered by the sixty-second article of war.

2. Officers of the Army are employed in the public service on duties not relating to the Army; but are, nevertheless, in the eyes of the law, considered on military duty. The money disbursed by them when so employed does not thereby become money furnished and intended for the military service.

The statutes of the United States authorize in many instances the employment of officers of the Army in duties which, when performed by a private citizen, would be a purely civil service, and in the discharge of these duties officers so detailed are required to disburse moneys appropriated for the civil establishment of the Government. The statutes referred to are as follows:

> Section 2062, Revised Statutes. The President may require any military officer of the United States to execute the duties of an Indian agent, and when such duties are required of any military officer he shall perform the same without any other compensation than his actual traveling expenses.

The money appropriated for the Indian service is required to be expended under the direction of the Secretary of the Interior.

Section 4664, Revised Statutes:

> The President shall cause to be detailed from the Engineer Corps of the Army, from time to time, such officers as may be necessary to

superintend the construction and renovation of light-houses.

Sections 4665 and 4666 of the Revised Statutes define the duties of engineer officers detailed under section 4664.

Section 4671, Revised Statutes:

> An officer of the Army or Navy shall be assigned to each district as a light-house inspector, subject to the orders of the Light-House Board. * * *

In the act making appropriations for sundry civil expenses for the Government for the fiscal year ending June 30, 1900, there are $625,000 appropriated for the repair of the light-houses, to be expended under the Treasury Department by engineer officers of the Army. (See 30 Stats., 1074, 1079.)

Under section 1800 the Chief Engineer of the Army is charged with the superintendence of the Washington Aqueduct and all other public works and improvements in the District of Columbia in which the Government is interested.

The commissioner of public buildings is an officer of the engineers who has charge of the disbursements of the funds appropriated for the maintenance of the public grounds about the Executive Mansion, greenhouses, the care, repair, furnishing and lighting of the Executive Mansion, maintenance of the Washington Monument, etc.

See act of Congress making appropriations for sundry civil expenses of the Government, 30 Stats., 1074, 1103, 1104.

Would it not be the height of absurdity to say that the funds appropriated for the Indian service, to be disbursed under the direction of the Secretary of the Interior; or funds appropriated for the Light-House Service, to be disbursed under the direction of the Secretary of the Treasury; or funds appropriated for the maintenance, etc., of the Executive Mansion; or funds appropriated for the Washington Aqueduct, and all other public works and improvements in the District of Columbia, to be disbursed under the War Department, become moneys "furnished and intended for the military service" of the United States by reason of the fact that officers of the Army under the orders of their superiors are charged with the supervision of such works and the expenditure of such moneys?

There is no question as to the organization of the Corps of Engineers of the Army, and the character of the various duties they have been, and are now, charged with, some of which duties if performed by a private citizen, but under the employment of others, would be a purely civil service. Nor is there any question that an officer performing such service is in contemplation of law on duty. It has been held that whatever service a military officer is lawfully ordered by his superior officer to perform is, in the eyes of the law, military duty; though when performed by a private citizen, but under the employment of others, it would be purely a civil service. Service on a detail in the Freedman's Bureau

was held to be a military duty. (*Runkle* v. *United States*, 19 Court Claims, 412.)

3. *Under the Constitution and laws of the United States the appropriations made for river and harbor improvements are for the benefit of commerce and navigation, and not for military or naval purposes; the money so appropriated is therefore furnished and intended for public works in aid of commerce.*

In the Constitution Congress has been given power "To regulate commerce with foreign nations and among the several States. * * * (Article I, section 8, Constitution of the United States.)

In expounding this power the Supreme Court has held that navigation is comprehended in it as an incident thereto. (Cooley's Principles of Constitutional Law, p. 63; *Gibbons* v. *Ogden*, 9 Wheat., 1.)

The power to construct works of river and harbor improvements in the navigable waters of the United States, this court says, is an incident of the power to regulate commerce. (*S. C.* v. *Ga.*, 93 U. S., 4; *Gillman* v. *Philadelphia*, 3 Wall., 713.)

In the execution of this power Congress has repeatedly enacted rules in respect to such improvements and their purposes. Section 231 of the Revised Statutes, taken from resolution No. 76 of July 27, 1868 (15 Stat., 262), provides:

> The Secretary of War shall cause to be prepared and submitted to Congress, in connection with the reports of examinations and surveys of

rivers and harbors hereafter made by order of Congress, full statements of all existing facts tending to show to what extent the general commerce of the country will be promoted by the several works of improvement contemplated by such examinations and surveys, to the end that public moneys shall not be applied excepting where such improvements shall tend to subserve the general commercial and navigation interests of the United States.

That owners, agents, masters, and clerks of vessels arriving at or departing from localities where works of river and harbor improvement are carried on shall furnish, on application of the persons in local charge of the works, a comprehensive statement of vessels, passengers, freight, and tonnage. That every person or persons offending against the provisions of this act shall, for each and every offense, be liable to a fine of one hundred dollars, or imprisonment not exceeding two months, to be enforced in any district court of the United States within whose territorial jurisdiction such offense may have been committed. (Act of February 21, 1891, 26 Stat. L., 766.)

The act of Congress approved August 2, 1882 (22 Stats., 213), provides:

That in every case where surveys are made the report thereon shall embrace such information concerning the commercial importance, present and prospective, of the improvement contemplated thereby, and such general commercial statistics as the Secretary of War may be able to procure.

And section 7 of the act of Congress of July 13, 1892 (27 Stat., 115), prescribes:

> That the preliminary examinations ordered in this act shall be made by the local engineer in charge of the district or an engineer detailed for the purpose; and such local or detailed engineer and the division engineer of the locality shall report to the Chief of Engineers, first, whether in their opinion the harbor or river under examination is worthy of improvement by the General Government, and shall state in such report fully and particularly the facts and reasons on which they base such opinions, including the present and prospective demands of commerce; and, second, if worthy of improvement by the General Government, what it will cost to survey the same with a view of submitting plan and estimate for its improvement; and the Chief Engineer shall submit to the Secretary of War the reports of the local and division engineers, with his views thereon and his opinion of the public necessity or convenience to be subserved by the proposed improvement; and all such reports of preliminary examinations, with such recommendations as he may see proper to make, shall be transmitted by the Secretary of War to the House of Representatives, and are hereby ordered to be printed when made.

In accordance with this legislation, the Chief of Engineers has annually submitted with his report to the Secretary of War the reports of his subordinates. Among them are those of the prisoner, Oberlin M. Carter, late captain of engineers, United States Army.

In his report upon the improvements of Savannah River and Harbor, Georgia, dated July 3, 1890, and addressed to the Chief of Engineers (see Annual Report of Chief Engineers to Secretary of War for 1890, Fifty-first Congress, second session, H. R. Ex. Doc. 1, part 2, vol. 2, p. 1245), Captain Carter submits a revised and enlarged project for this work and states:

> The improvement of the harbor of Savannah has led to a great and rapid increase in the commerce of the port. Existing railroads have extended their lines and made new connections, opening up a much larger territory for the trade of Savannah. A new road (the Savannah, Americus and Montgomery Railway) completed its line to Savannah in May last. Two other roads to terminate at Savannah are in process of construction, and others are still projected. One road increased its rolling stock during the past year by 4,000 cars to handle its increased traffic, and the increase has been proportional on other roads. Still, much freight has been rejected and sent to northerly ports on account of the inability of those roads to handle all that offered. The systems now terminating in Savannah have more than 4,000 miles of track, exclusive of connecting lines. Another means of communication with the interior is the Savannah River, navigable as far as Augusta for boats drawing about 4 feet of water. These avenues of commerce bring to Savannah the cotton, lumber, naval stores, and farm products of large portions of Georgia, South Carolina, Florida, Alabama, Mississippi, and Tennessee,

as well as other classes of through freights from the North and West.

Regular lines of steamers have been established between this port and Boston, New York, Philadelphia, and Baltimore. A large fleet of coasting vessels is also engaged in the Savannah trade. About one-third of the exports are to foreign ports, and in this foreign trade is engaged a large number of foreign steamers and sailing vessels of great draft and tonnage.

STEAMSHIP LINES.

Line.	Savannah to—	Number of steamers	Number of voyages.	Tons freight.
Ocean Steamship Co.	Boston	4	60	77,440
Do	New York and Philadelphia.	10	230	411,654
Merchants and Miners' Transportation Co.	Baltimore	3	70	93,584
Total		17	360	582,678

SHIPPING AND TONNAGE OF THE PORT OF SAVANNAH, JUNE 1, 1889, TO MAY 31, 1899, ENTERING AND OUTWARD BOUND.

	Steam.	Sail.	Total.	Tonnage.
American	758	570	1,328	1,363,880
Foreign	215	472	688	538,568
Total	973	1,042	2,016	1,902,448

Vessels are now limited to a draft of about 21 feet. The three new railroads in process of construction, and the greater facilities for carrying freight adopted by existing roads, will bring to Savannah in the future a greatly increased volume of trade seeking an outlet to coastwise and foreign ports. Light-draft vessels will be unable to handle this trade economically. Past improvement has resulted in increasing the available depth at high water from

about 15 feet to about 21 feet. As stated in last year's report, the annual saving of freight rates alone due to this cause amounts to more than the total sum of money expended by the United States upon the harbor since the close of the civil war. Rates of marine insurance have also been reduced. The increase in the value of exports since 1873, when works of improvement were begun under the existing project, is proportional to the cube of the interest in the depth of water during the same period. If the same proportion should hold till a depth of 26 feet is reached, the value of the exports alone would then be $150,000,000.

This is followed by the cotton statistics of the port of Savannah for the commercial year ending August 31, 1889, and by an abstract of the "Arrivals and clearances of vessels and commerce at Savannah, Ga., from January 1, 1873, to December 31, 1889."

In submitting this report to the Secretary of War, the Chief Engineer remarks:

Respectfully submitted to the Secretary of War.

The plan of improvement under which operations have been carried on up to date provides for the establishment of a channel from Tybee Roads to the city of Savannah practicable at high tide for vessels drawing 22 feet of water, and the widening of the channel of the river opposite the city to 600 feet, of uniform depth with the balance of the channel.

To comply with the provisions of the river and harbor act of August 5, 1886, a survey was

made, under the direction of Col. Q. A. Gilmore, Corps of Engineers, of the "Savannah River, from cross tides above Savannah to the bar, with a view to obtaining 28 feet of water in the channel," and an estimate for the improvement was submitted, amounting to $6,660,000. (Annual Report, Chief of Engineers, 1888, Part II, pp. 1059–1073.) As no action has been taken on this report, and a mean high-water depth of 22 feet being insufficient to accommodate the large and rapidly growing commerce upon the Savannah River, and the project for securing a depth of 28 feet requiring so large an expenditure, I directed Lieutenant Carter to prepare and submit a project with an estimate of the cost of obtaining a channel of 26 feet at high water, and it is in compliance with these instructions that the within project is submitted. It is recommended that the future operations on this river be directed to securing a depth of 26 feet, as within proposed, and that the project be amended in this particular.

THOS. LINCOLN CASEY,
Brig. Gen., Chief of Engineers.

JULY 22, 1890.

The recommendations of the Chief of Engineers in his indorsement are approved.

L. A. GRANT,
Assistant Secretary of War.

In the same executive document, on pages 1422 and 1424, a report of Capt. Oberlin M. Carter to the Chief of Engineers will be found in respect to the Cumberland Sound improvement, the other of the works in connection with which the said Carter was convicted

of crimes. In respect to the object and purpose of this improvement he says:

> All of the commerce of St. Marys, Ga., and 90 per cent of the commerce of Fernandina, Fla., are dependent on water transportation through Cumberland Sound. The trade of Fernandina increases yearly, and in 1889 exceeded that of 1888 by 20 per cent. An estimate based on the first five months of 1890 indicates that the commerce during the present year will be from 30 to 40 per cent greater than that of last year.
>
> The Florida Central and Peninsula Railroad, terminating at Fernandina, besides running through a fertile and well-timbered country, pierces also the Florida phosphate fields, and much of the rock from the phosphate mines will be brought by this road to Fernandina for shipment to foreign and coastwise ports. Anticipating this increased traffic, the railroad is extending its terminal facilities and building new wharves.
>
> Two steamships per week ply between Fernandina and New York, and fifteen steamers per week between Fernandina and local coastwise ports. A large fleet of foreign and coastwise vessels also engage in the commerce of this port.
>
> In 1889 the shipments, foreign and coastwise, amounted to 407,589 tons, valued at $5,000,000, on which the freightage was $1,000,000; and the receipts by water were 43,533 tons, valued at $3,865,000, on which the freightage was $650,000. The number of passengers carried was 4,500.

And this is followed by a table of the amounts and values of the shipments and receipts of articles of commerce by and a table of arrivals and clearances of vessels at Fernandina, Fla., from January 1, 1875, to December 31, 1889, and by similar tables relating to shipping and commerce of St. Marys, Ga.

The annual reports of the Chief of Engineers to the Secretary of War for the years 1891 to 1897, inclusive, contain similar reports from Captain Carter upon these two public works.

Fifty-second Congress, first session, H. R. Ex. Doc. 1, part 3, vol. 2, pp. 1497, 1503, 1504, 1505, 1522, 1523, 1561–1565.

Fifty-second Congress, second session, H. R. Ex. Doc. 1, part 2, vol. 2, pp. 1243, 1245 et seq., 1286, 1288 et seq., 1599.

Fifty-third Congress, second session, H. R. Ex. Doc. 1, part 2, vol. 2, pp. 1542, 1546, 1550, 1552, 1596, 1598, and 1599.

Fifty-third Congress, third session, H. R. Ex. Doc. 1, part 2, vol. 2, pp. 1135, 1136, 1157, 1158, 1160, 1161, 1201–1206.

Fifty-fourth Congress, second session, H. R. Ex. Doc., Vol. II, pp. 1211, 1220, 1221, 1285, 1288, 1289, 1293.

Annual Report of Chief of Engineers, Vol. II, pp. 1493, 1497 et seq., 1526, 1528.

In each of these the purposes of these improvements for the benefit of commerce and navigation are discussed and statistics concerning these objects are submitted in substantiation of the necessity of the improvements. But nowhere in any of the reports

herein referred to, and directly relating to the works set out in the record of this case, can the slightest reference be found as to any connection of these works with the military service or military purposes, or as to their value or bearing upon the military or naval operations in the country. They are purely and simply public works for the benefit of commerce.

The money made the subject of the embezzlement in this case was appropriated—to be expended under the War Department—in the act of Congress of June 3, 1896 (29 Stat., 202–298), entitled, "An act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes." And in the act of June 4, 1897 (30 Stat., 11 and 44), entitled, "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June 30, 1898, and for other purposes."

The War Department, as has already been shown, is a part of the civil establishment of the Government, and the personnel and property belonging thereto is a part of the civil service, to which all the civilian assistants and the employees of the officers on river and harbor improvement duty belong.

4. *Attorney for appellant has been misled when he states that the Judge-Advocate-General has held that offenses under section 5488, Revised Statutes, are properly chargeable under the sixtieth article of war. No opinions rendered by the Judge-Advocate-General hold that view.*

In support of the claim that the specification to the fourth charge should have been laid under subdivision 9 of the sixtieth article of war, appellant says:

> In the Opinions of the Judge Advocate-General it was expressly held that the withdrawing by a disbursing officer of the Army from an authorized depository of *public funds* for a purpose not prescribed or authorized by law—as for personal use, or to pay claims not due from the United States or payable by such officer—being a form of embezzlement defined by section 5488, Revised Statutes, was properly chargeable under the sixtieth article of war, and conviction of an officer upon such a charge was held authorized and legal. (Digest of Opinions of Judge Advocate-General, p. 57.)

An examination of the opinions in the cases upon which the foregoing statement is based discloses the fact that the compiler made a serious error, for none of the opinions rendered sustain his assertion. To the contrary, the distinction between the character of the general offense of embezzlement and the particular offense of embezzlement defined in the act of June 14, 1866, now section 5488, Revised Statutes, is clearly set out and defined, the difference being so marked

that it would be clearly an error to charge the acts set in the latter statute as a violation of the sixtieth article of war. The opinions referred to were rendered in the following cases, viz:

First Lieut. John F. Skelton, Forty-fifth Infantry, G. C. M. O., No. 43, of 1868.

First Lieut. Thomas W. Shaw, Twenty-eighth Infantry, G. C. M. O., No. 86, of 1868.

First Lieut. Charles Jordan, Sixteenth Infantry, G. C. M. O., No. 27, of 1872.

Maj. Henry B. Reese, paymaster, U. S. A., G. C. M. O., No. 34, of 1872.

Maj. R. P. Runkle, U. S. A., G. C. M. O., No. 7, of 1873.

All of these officers except the last named were tried, among other offenses, for illegally withdrawing from the authorized depositories or applying to a purpose not authorized by law money intrusted to them, and in each of these cases the money so withdrawn or so misapplied was furnished or intended for the military service, but the offenses were charged under the act of June 14, 1866, now section 5488, Revised Statutes, and *not* under what is now subdivision 9 of the sixtieth article of war.

Major Runkle was tried under the act of March 2, 1863, now the sixtieth article of war, for embezzlement, and not for any acts legitimately chargeable under the act of June 14, 1886.

In remarking upon the general offense of embezzlement as then set out in the thirty-ninth article of war of the Articles of 1806, and upon the special embezzle-

ment defined in the act of June 14, 1866, Judge-Advocate-General Holt, in his opinion upon the case of Major Reese, above cited, says:

> * * * The court may well be supposed to have construed the thirty-ninth article as contemplating an embezzlement or misapplication with fraudulent intent, and to have acquitted on the ground that there was, upon the testimony, a reasonable doubt as to the existence of such intent. But if this conclusion be accepted, the fact remains that no such construction could properly govern in connection with the other charge (embezzlement, under the act of June 14, 1866). The statute of 1866, in view of which it was preferred, is the expression of an extreme vigilance in regard to the proper use and disposition of the public moneys, found by the experience of the Government to have become imperatively necessary to be observed. It provides an additional safeguard of the public treasury by enacting that any disbursing officer who shall withdraw, transfer, or apply any of the public funds intrusted to him for any purpose not authorized by law shall be deemed guilty of a felonious embezzlement and be punished accordingly. The intent of the officer, whether innocent or fraudulent, enters in no manner into the statutory offense. If his act of withdrawal, application, etc., of the funds is simply one not authorized by existing law he is guilty of the crime here defined by Congress. His intent, if innocent, may perhaps be considered in mitigation of punishment, but can not be relied upon as a legal bar against conviction.

> The offense created by this act belongs to the class known as *mala prohibita;* but it is upon the repression of this class of offenses that the safety of the public treasury largely depends.

Now, the embezzlement set out in the old thirty-ninth article of war, as well as the embezzlement set out in subdivision 9 of the sixtieth article of war, is the embezzlement in which felonious intent is essential, and the offense itself belongs to the class known as *malum in se.*

In the publication to the Army of the case of Major Reese, the Secretary of War, approving the views of Judge-Advocate-General Holt, said:

> In the opinion of the Secretary of War, they might well have convicted the accused of at least a portion of the charged violations of the act of June 14, 1866 (now sec. 5488, R. S.), a statute enacted for the more complete protection of the Treasury, * * * and which, without regard to the *intent* of the offender, denounces all withdrawals from a public depository or dispositions of public moneys not authorized by express law. (G. C. M. Orders, No. 34, War Dept., Nov. 30, 1872.)

This authoritative ruling, as well as the publication in orders of the trial of similar cases above cited, and the approval of the findings and sentence in each case by the President, entered into the military law and became important precedents for the guidance of courts-martial in similar cases, for military law is made up in part of the orders, published to the Army. (1st Winthrop, 4 and 38.)

As a rule, therefore, acts defined in section 5488, Revised Statutes, have been brought to trial as embezzlement under this section in violation of the sixty-second article of war, and *not* under the sixtieth article of war. In substantiation of this statement, attention is invited, in addition to the cases already cited, to the cases of:

Maj. John McClintock, Thirty-sixth Infantry, published in G. C. M. O., 5, of 1869.

Maj. J. L. Hodge, paymaster, U. S. A., published in G. C. M. O., 21, of 1871.

Capt. T. B. Hunt, A. Q. M., published in G. C. M. O., 18 of 1874.

First Lieut. George B. McDermott, published in G. C. M. O., 58 of 1874.

Maj. V. S. Eggleston, paymaster, published in G. C. M. O., 81 of 1874.

First Lieut. W. M. Fleming, Twelfth Infantry, published in G. C. M. O., 52 of 1877.

Maj. James H. Nelson, paymaster, published in G. C. M. O., 5 of 1881.

Maj. J. W. Wasson, paymaster, published in G. M. C. O., 30 of 1883.

In conclusion it may be asserted that the embezzlement set out in the sixtieth article of war is the ordinary embezzlement, while the specification under the fourth charge sets out a special statutory embezzlement. The distinction between the two is marked. The statute does not require, and the specification does not allege, that the money or property ever came into the possession of the accused and that he converted the same to his own use, but alleges, as the statute requires, that

money of the United States had been diverted from the use to which it was dedicated by the appropriation of Congress. This makes a special statutory offense of embezzlement, distinct and independent of the ordinary offense of embezzlement under the sixtieth article of war, and is "not mentioned in the foregoing articles of war," and the accused, Oberlin M. Carter, under this fourth charge and specification was properly triable and punishable under the sixty-second article of war. This view, urged in the court below, was sanctioned by it, as is shown by its opinion (Record, p. 106, folios 2119, 2120), as follows:

> It is also contended that under the sixty-second article of war no charge can be preferred that is embraced in any other article, and that, as the charge is that of embezzlement, it is covered by either the first, fourth, or ninth paragraph of the sixtieth article of war. Assuming, but not deciding, that no charge can be laid under the sixtieth article of war if it is mentioned in any other article, still it is apparent that the embezzlement defined in section 5488, Revised Statutes, is not the offense denounced in either the first or fourth paragraph referred to, and I am also of the opinion that it is a species of embezzlement distinct from that defined in the ninth paragraph of the sixtieth article of war, since the money which is the subject of embezzlement under the latter article is "money furnished for the military service;" whereas, under section 5488, the term money comprehends any public money, whether appropriated for the military service or for other purposes.

> The offense denounced in section 5488 is much broader and more comprehensive than the other, the former being the application by a disbursing officer of money to any authorized purpose, whilst under the ninth paragraph mentioned the money which is the subject of this embezzlement is money appropriated specifically for the military service, and it is quite probable from the contents of the entire paragraph that the term "embezzlement," as there employed, means such an offense as is generally understood where one having the money of another in his custody appropriates it to his own use with felonious intent, intending to deprive the true owner thereof.

The act of March 3, 1863, from which the sixtieth article of war was taken, was passed while a great war was in progress, and was intended to punish frauds and other offenses against the United States which arose in the gigantic operations of the Government in equipping and supplying its armies. River and harbor improvements were then at a standstill; there was other and more serious work for our corps of engineers than to construct improvements for the benefit of a commerce which was in abeyance on the vast theater of war. It can not, therefore, be said that harbor and river improvements were had in view when Congress passed the act known for many years as the fraud act, and now forming the sixtieth article of war and section 5438 of the Revised Statutes.

POINT III.

The sentence in this case is not in violation of the one hundred and second article of war. The fifth amendment to the Constitution does not apply to trials by courts-martial. Each of the charges upon which the prisoner was convicted is a distinct substantive offense, which was within the province of the court-martial alone to determine as having been violated by the accused, and the sentence imposed is legal.

It has already been remarked that in his specification of errors the appellant has omitted his assignment of error "that the sentence is in violation of the one hundred and second article of war, the accused having been twice punished for the same offense." He now bases his claim of illegal double punishment wholly upon the fifth amendment. He says:

> The sentence is in violation of the fifth amendment of the Constitution. Assuming that it has been demonstrated that the specification under Article of War 62 was wrongly laid thereunder, and that conviction and sentence under charge 4 was beyond the powers of the court-martial, it is now insisted that by the sentence of fine, imprisonment, dismissal, and degradation, Captain Carter has been more than once put in jeopardy for the same offense.

To sustain this contention the attorney of the appellant (appellant's brief, p. 73) again resorts to his peculiar method of manufacturing evidence for the occasion by asserting that the return failing to traverse certain allegations made in the petition for the writ in this case, these allegations must be accepted as true

and should be admitted as evidence in this case in support of the plea of double jeopardy.

Reference is made to the statement in this case where the appellee has shown the error made by this appellant and that in this respect he is contradicted by the record in this case. The particular contention, therefore, on the part of the appellant, may be considered as eliminated.

In the *Esmond case* (5 Mackey's Reports, 73) the supreme court of the District of Columbia (sitting as an appellate court), said, in discussing the eighth section of the first article of the Constitution, and the fourth, fifth, and sixth amendments thereto, as follows:

> These provisions contemplate the establishment by Congress of two distinct systems of jurisdiction for the punishment of crime, and that each should be complete and sufficient. In other words, they import that the power of Congress to make rules for the government of the land and naval forces includes the power to establish institutions for the trial and punishment of crimes committed by persons in the land and naval forces, whose action and judgments shall be as conclusive for all purposes as the action and judgments of any other tribunal can be.
>
> If such tribunals have actually been established, their judgments must be treated precisely as the judgments of the courts of the other system of jurisdiction are treated.
>
> In the light of the Constitutional authority to do so, it is clear to us that Congress has intended by the Articles of War to establish such a system. * * *

In *ex parte Henderson* (11th Fed. Cases, 349), the court said:

> Courts-martial are lawful tribunals existing by the same authority that other courts exist. Their jurisdiction, it is true, is limited and special, being confined to military persons charged with military offenses; over such persons charged with offenses defined by military law their jurisdiction is complete. They are indeed liable to the controlling authority which the civil courts have at all times exercised of preventing them from exceeding the jurisdiction given to them. * * * In respect to persons subject to their authority and charged with offenses subject to their jurisdiction, the civil courts do not sit as a court of error to review the regularity of their proceedings. Informality, therefore, in the proceedings of courts-martial can not be remedied or inquired into by a civil court. The ground work of the jurisdiction and the extension of the powers of courts-martial are to be found in the Articles of War * * * but these articles do not alone constitute the military code. They are, for the most part, silent on all that related to the procedure of military tribunals to be organized by them. This procedure is founded upon the usage and customs of war, upon the regulations prescribed by the President, upon the authority of Congress, and upon old practices in the Army, as to all of which points common-law judges have no opportunity, either from their law books or from the course of their experience, to inform themselves. It would, there-

> fore, be most illogical, to say nothing of the impediments to military discipline, which would thereby be interposed to apply to the proceedings of courts-martial those rules which are applicable to another and different course of practice. (Lord Denman's opinion, In re Poe, 5 B, and A688.)

As the two jurisdictions discussed in these two opinions derive their power and practice from different sources, causes arising in each must necessarily be examined and adjudged under the practice and by the law applicable to that jurisdiction under which they arise.

Under the constitutional powers to prescribe rules for the government of the Army, Congress, in the Articles of War, has established the following oath for members of courts-martial:

> You, A B, do swear that you will well and truly try and determine, according to evidence, the matter now before you between the United States of America and the prisoner to be tried, and that you will duly administer justice, without partiality, favor, or affection, according to the provisions of the rules and articles for the government of the armies of the United States, and if any doubt should arise not explained by said articles, then according to your conscience, the best of your understanding, and the custom of war in like cases. (Art. 84, sec. 1342, Rev. Stats.)

The oath makes primarily the Articles of War the rule and guide of courts-martial. If, therefore, a question in the trial of a case arises, it must be decided

under the said articles if it is covered by them. In the case at bar it is claimed by the appellant that under the charges upon which the accused is arraigned and of which he was convicted he has been twice tried and punished for the same offense. The one hundred and second article of war (section 1342, Revised Statutes of the United States) reads as follows:

> No person shall be tried a second time for the same offense.

The court-martial, therefore, under its code had perfect jurisdiction to dispose of any plea that the accused was being tried twice in the same proceeding for the same offense. This being the case, any claim now raised as to having been twice punished under such a proceeding remains a question under the one hundred and second article of war and can not be changed or transferred into a violation of so much of the fifth amendment of the Constitution which reads, "Nor shall any person be subject for the same offense to be put twice in jeopardy of life and limb;" for this prohibition relates to another jurisdiction, viz, the United States courts, established under another power in the Constitution. It requires no argument that courts-martial are not United States courts or parts of the judiciary of the United States. The provisions of the fifth, sixth, and eighth amendments relate to judicial proceedings in courts of the United States.

Barron v. *Mayor of Baltimore*, 7 Peters, 243;
Ex parte Watkins, ib., 573.
Pritchell v. *Commonwealth*, 7 Wall., 326.
Edward v. *Elliott*, 21 ib., 557.

Walter v. *Sauvinett*, 2 Otto, 90.
Parsons v. *Yendall*, 5 ib., 294.
1 Bick Crim. Law, 931, 946.
Dynes v. *Hoover*, 20 Howard, 78, 79.

> Article V, of the amendments, and Articles VI and VII contain * * * provisions concerning trials in the courts of the United States designed as safeguards to the rights of parties. (*In re Biglow*, 113 U. S., 330.)

In ex parte Milligan (4 Wall., 123), Mr. Justice Davis, in speaking for this court, said:

> The sixth amendment affirms that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury," language broad enough to embrace all persons and cases; but the fifth, recognizing the necessity of an indictment or presentment, before anyone can be held to answer for high crimes, "except cases arising in the land and naval forces, or in the militia, while in actual service, in time of war or public danger," and the framers of the Constitution doubtless meant to limit the right of trial by jury, in the sixth amendment, to those persons also who were subjected to indictment or presentment in the fifth.
>
> The discipline necessary to the efficiency of the Army and Navy required other and swifter modes of trial than are furnished by the common law courts; and in pursuance of the power conferred by the Constitution, Congress had declared the kinds of trial and the manner in which they shall be conducted, for offenses committed while the party is in the military or

naval service. Everyone connected with these branches of public service is amenable to the jurisdiction which Congress has created for their government, and, while thus serving, surrenders his right to be tried by civil courts.

In the same case the Chief Justice said:

It is not denied that the power to make rules for the government of the Army and Navy is a power to provide for trial and punishment by military courts without a jury. It has been so understood and exercised from the adoption of the Constitution to the present time. Nor, in our judgment, does the fifth or any other amendment abridge that power. "Cases arising in the land and naval forces, or in the militia, or in actual service in time of war or public danger," are expressly excepted from the fifth amendment: "That no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury," and it is admitted that the exception applies to other amendments as well as to the fifth.

Now, we understand the exception to have the same import and effect as if the powers of Congress in relation to the government of the Army and the militia had been recited in the amendment, and cases within those powers had been expressly excepted from its operation. The States most jealous of the encroachment upon the liberties of the citizen, when proposing additional safeguards in the form of amendments, excluded specifically from their effect cases arising in the government of the land and naval

forces. Thus Massachusetts proposed "that no person shall be tried for any crime by which he would incur an infamous punishment or loss of life until he first be indicted by a grand jury, except in such cases as may arise in the government and regulation of the land forces." The exception in similar amendments proposed by New York, Maryland, and Virginia was in the same equivalent terms. The amendments proposed by the States were considered by the first Congress, and such as were approved in substance were put in form and proposed by that body to the States. Among those thus proposed and subsequently ratified was that which now stands as the fifth amendment of the Constitution. We can not doubt that this amendment was intended to have the same force and effect as the amendment proposed by the States. We can not agree to a construction which will impose on the exception in the fifth amendment a sense other than that obviously indicated by the action of the State conventions.

We think, therefore, that the power of Congress in the government of the land and naval forces and of the militia is not at all affected by the fifth or any other amendment. (4 Wall., 142.)

Although the opinion of the court in this case is not so explicit in its language as that of the minority in stating that the government of the land and naval forces is not affected by the amendments, this would seem to have been in Mr. Justice Davis's mind also. The separateness of the jurisdictions was evidently before him when he said that the discipline of the Army and Navy

required other and swifter methods of trial than are furnished by the common-law courts, and therefore, Congress, in pursuance of the powers conferred by the Constitution, had declared the kinds of trial, and the manner in which they should be conducted, for offenses committed by persons in the military and naval service—that is, offenses against these jurisdictions, for, except in so far as the person who enters either service thereby assumes new obligations, his obligations existing before his entry into the service remain in force, modified, however, to some extent, by his new status.

While there was in this case no direct issue as to the applicability of the amendments to cases of persons regularly enlisted or commissioned in the land or naval forces, yet enough appears in the majority and minority opinions as to the general scope, force, and effect of these amendments to justify the conclusion that if that issue had been before the court it would have held that the amendments do not apply to the cases of officers and soldiers in the military service when tried under the Articles of War.

It may also be said that it requires no argument that the Articles of War and the regulations of the President to carry them into effect are inconsistent with the provisions of the amendments of the Constitution and deprive the officers and soldiers in their military status of rights guaranteed to citizens by the Constitution. For the efficiency of the Army and the purposes for which it has been created this must be so. A cursory glance at the Articles of War and Army Regulations shows that the nineteenth article of war

abridges the right of freedom of speech as this right is defined by text writers on constitutional law; that the sixty-fifth article of war and military procedure generally is inconsistent with the provisions of the fourth amendment of the Constitution; that the ninety-first article of war and military procedure under it require, in cases not capital, the taking of depositions of witnesses residing beyond the limits of the State, etc., in which the military court is in session, and authorizes the reading in evidence of such deposition, which is clearly antagonistic to the sixth amendment, which grants every person the right "to be confronted with the witnesses against him;" and further, that the twenty-ninth and thirtieth articles of war abridge, if not totally deny, the officers and soldiers the right to assemble and petition the Government for redress of grievances, so granted in the first amendment, as defined by text writers on constitutional law.

These restrictions and deprivations of constitutional rights have principally their origin in the Articles of War of 1776, subsequently revised and reframed by a committee consisting of John Adams, Thomas Jefferson, John Rutledge, James Wilson, and R. R. Livingston. After the adoption of the Constitution these articles were continued in force by the First Congress of the United States on September 29, 1789, and have come down to us with modifications and revisions in 1806 and 1874.

That the soldier in his military status must forfeit such of his civil rights as interfere with the government and regulation of the army was recognized in England

by the late Sir Robert Peel while in office. He remarked: "It would be utterly impossible to maintain discipline if soldiers were allowed to be political partisans, correspondents for newspapers, or members of political clubs. Then, indeed, a standing army would be in truth a curse; then might they bid farewell to civil liberty."

He thought, therefore, "that it was fully in the power of the commanding officer to interdict soldiers communicating with the newspapers and to prevent them from being members of a political union." He denied the truth of the doctrine that a soldier continues to enjoy all the rights of the citizen. "It was clear that he must forfeit that portion of his civil rights which would interfere with the discipline of the army."

Acting upon the principle enunciated by this great statesman a general order was put forth by the commander in chief under date of August 3, 1835, requiring the officers and men to withdraw their attendance from Orange and other political assemblies under the penalty of being tried and punished by courts-martial for their disobedience. (1 Clode's Mil. Forces of the Crown, 161.)

Military law is the specific law which governs the Army as a separate community alike in peace and in war.

By entering this community the citizen becomes a soldier. His relations to the State and to the public have changed. He acquires a new status with correlative rights and duties, this court says in the *Grimley case* (*supra*). He

waives in some particulars his rights as a citizen, surrenders his personal liberty during the existence of his new status, and consents to come and go at the will of his superior officers. He agrees to relinquish his right to trial by jury, to be disciplined for offenses unknown to the civil law (*United States* v. *Clark*, 31 Fed. Rep., 713). The very nature of this community makes it evident that it can not be governed by the code of laws which applies to the great body of citizens. Military exigencies require not individual liberty but subordination, obedience. The very rules which are found to protect the individual rights of the people would destroy discipline. A celebrated general of modern times has remarked that "an army without discipline is always costly, in war useless, and in peace dangerous."

It is to be remarked there is nothing in the record of the court below to show that the trial court refused to sustain a plea of the accused that he was being twice tried for the same offense in the same proceeding, in violation of the one hundred and second article of war or the fifth amendment. As a matter of fact no such plea was made, and this is shown by the general court-martial orders, part of the record in this case.

It is a general rule that such a plea as described is a defense which must be raised at the trial, and can not be made the ground of an application for a writ of habeas corpus. (15 Ency. of Law, 169; *Ex parte Bigelow*, 113 U. S., 328; *Ex parte Ulrich*, 43 Fed. Rep., 661.)

This plea was waived when the accused pleaded to the general issue.

Supposing, now, as a matter of illustration, that the accused had in the trial court pleaded in bar of trial the one hundred and second article of war, and the court-martial had decided the plea to be invalid, the circuit court below would have had to hold that that decision was valid and binding because the court-martial had jurisdiction. (See Esmond's Case, 5 Mackey's Reports, 73.)

But if the court-martial had decided that the plea was valid, and had, nevertheless, gone on and tried and sentenced him for the offense involved in the plea, the court below on writ of habeas corpus would have undoubtedly discharged him on the ground that the court-martial had no jurisdiction to try him twice for the same offense. This, not because of the provisions in the fifth amendment relating to former jeopardy, but because the one hundred and second article of war provides that "no person shall be tried a second time for the same offense."

Assuming, for the sake of argument, that these two provisions are the same in meaning, nevertheless it is clear that they belong to different systems of law, and each is of force in the sphere of its own system, but without any force or effect at all in the other sphere.

In addition, it is to be remarked that the fifth amendment is the very embodiment of the common law and in its true meaning inapplicable to trials by courts-martial; in the latter tribunals the accused does not call upon his country for deliverance. There is

no jury and there are no judges in the sense in which those terms are known under the common law. The rules under the latter as to when jeopardy attaches are wholly inapplicable to a case before a court-martial. The very enactment of the one hundred and second article of war is proof that the framers thereof did not believe that the fifth amendment in respect to jeopardy applied to trials under the Articles of War.

In the case as supposed in the illustration there would have been no constitutional question raised at all, any more than a plea of *autrefois acquit* in the case of a felony in the circuit court would have raised a question of the meaning and effect of the one hundred and second article of war. The fact that in the case at bar no plea of being twice tried was made in the trial before the court-martial, and was not advanced until the application for the writ of habeas corpus was made to the court below, does not change the force of the argument that no constitutional question was legitimately raised in this case before the circuit court of the United States for the district of Kansas.

A careful examination of the opinion of that court in this case (Record, pp. 102–108, folios 2114–2133) does not disclose that any constitutional question was considered or decided; it simply discusses the meaning of the statutes—the Articles of War—involved and the sufficiency of the charges brought under them. And if thereby inferentially the result was at all reached that the accused was not tried twice for the same offense it was reached under the provisions of the Articles of War and did not involve the fifth amendment.

Neither that amendment nor the one hundred and second article of war was mentioned in that opinion nor even inferentially or remotely referred to either in spirit or substance.

Under the rule laid down by this court in the case of *Cornell* v. *Green* (163 U. S., 79), a case may be said to involve the application of the Constitution of the United States when a title, right, privilege, or immunity is claimed under that instrument, but a definite issue in respect of the possession of the right must be distinctly deducible from the record before the judgment of the court below can be reviewed on the ground of error in the disposal of such a claim by its decision.

There is no such issue deducible from the record in this case. The assertion that the accused is held in violation of the fifth amendment of the Constitution is an averment of mere conclusions of law, and not a matter of fact supported by the record.

It is respectfully submitted that such an assertion can not be availed of as an assignment of error for the purpose of importing a constitutional question into a cause so as to give jurisdiction to this court under the fifth section of the act of March 3, 1891.

It is claimed in the court below that the accused has been twice and even oftener punished for the same offense, because the overt act in furtherance of the conspiracy under Charge I is based upon two certain payments, which are the same offense of which the accused was found guilty under Charges II, III, and IV. In other words, it is alleged, a single criminal act has been split up into four separate charges.

This is identically the same contention advanced before the circuit court of appeals, second circuit, and before this court in the petition for a writ of certiorari.

This contention is fallacious, both upon the facts and the law, and disregards the apparent fact that under each of the said charges the gist of each offense is separate and distinct.

In other words, the gist of Charge I is a conspiracy to defraud the United States, in violation of article 0 of the Articles of War. The real offense, then, is the unlawful agreement or combination upon the part of the accused with the others mentioned in the specifications, which makes the common-law offense of conspiracy. The unlawful agreement or combination alone would constitute the offense under said article, without requiring any overt act to be set forth to complete the offense, as in the internal-revenue acts of conspiracy to defraud (Rev. Stat., 3169) and other cognate statutes.

It is, therefore, plain that the accused would come within the statute if he had conspired to commit the offense without having performed any act to effectuate the object thereof.

The gist of the offense under Charge II is the causing of false and fraudulent claims to be made against the United States, which would have been complete even though the accused had not conspired with any other persons to effectuate his fraudulent scheme, and was complete when he caused the said claims to be

made and presented, although payment thereof never had been allowed or made.

Under Charge III any conduct unbecoming an officer and a gentleman would be in violation of the sixty-first article of war, so that if the petitioner had been found guilty of any one of the separate offenses provided for under article 60 then it became mandatory upon the court-martial to dismiss him from the service by reason of such acts, and is a separate punishment, not included in the punishment of any of the other articles of war, and follows, as a necessary corollary, his conviction upon any other charges. Judge Lacombe, in the case at bar, says:

> This is a provision only independent of the other definitions of offenses in the statute. The same course of conduct may constitute an offense elsewhere provided for, and also may warrant a finding of guilty under the sixty-first article of war.

The gist of the offense under Charge IV, as defined by section 5488 of the Revised Statutes, is the embezzlement of funds intrusted to the petitioner in his official capacity, and for which character of embezzlement no provision is made specifically in any of the Articles of War.

An examination of the specifications under Charge IV will show that the embezzlement therein set forth is not such an embezzlement as is provided for in any of the subdivisions of article sixty, as the only embezzlement provided for under that article is where the thing or money embezzled was furnished or intended for the

military service of the United States; and, as has been shown in the discussion under Point I of this brief, the moneys so embezzled were not intended for the military service of the United States, but for river and harbor improvements.

So, therefore, the gist of the offense is necessarily different and distinct from those charged under the other article.

Furthermore, the payment of the two separate checks set forth as constituting the embezzlement under Charge IV was not an element necessary to or incorporated as a part of any of the offenses charged under the other articles.

It follows, therefore, that a single criminal act has not been split up into four separate things, but that under the statute the petitioner was guilty of four separate and distinct offenses.

It is respectfully submitted that nothing contained in the decisions in *Ex parte Nielson* (131 U. S., 176) and *Ex parte Lange* (85 U. S., 163) support the contention of the petitioner, or militate against the strength of the above propositions, and are readily distinguished upon the facts and upon the law from the case at bar.

The rule applied by the civil courts of the land, in order to determine whether there has been a double conviction for the same offense, is stated in the case of *Morley* v. *Commonwealth* (108 Mass., 433, 435), which has been approvingly quoted by this court, namely:

> A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence

> required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other. The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. A single act may be an offense against two statutes; and if the statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.

While under the distinct system of military jurisdiction, established by Congress under the Constitution, the common-law rules governing civil courts are not always applicable to courts-martial, yet we will endeavor to apply the foregoing rules to the case before us. Examining the specifications under charges one, two, and four, and applying the foregoing test to each, it can be confidently asserted that the evidence required to support a conviction of the fourth charge and its specification would not be sufficient to warrant either a conviction of the second charge and its specification or of the first charge and its specification, conviction of the latter requiring evidence, in many respects, of a character foreign to either of the two charges and specifications first named. In view of what has been said heretofore upon the character of these charges and specifications it is not deemed necessary to go into a more detailed comparison. An inspection of the record filed with the return in this case will demonstrate the truth of the statements made.

Now, although the trial and conviction of the accused under the third charge has been hereinbefore justified as a legal and proper proceeding (see opinions of Judge Lacombe and Wallace, *supra*), and not conflicting with the provisions of the one hundred and second article of war, in which it is prescribed that "no person shall be tried a second time for the same offense," it will not be improper to show that to the trial and conviction of the accused under that charge the test set out in the second part of the Morley decision (*supra*) may be applied, namely, that "a single act may be an offense against two statutes, and, if the statute required proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other." The specifications under the fourth and third charges are similar in tenor, but the statute under which the third charge is laid requires proof that the act shall be "unbecoming an officer and a gentleman," a fact not required by the statute under which the fourth charge is laid.

From all this it may be safely asserted that not only in the light of military law but also under the rules of the common law, if they were applicable, there is no merit in the claim that the accused has been twice or thrice punished for the same offense. No violation of the one hundred and second article of war has been committed or can be claimed, and no foundation for a constitutional question has been laid, nor could any such question be raised in this case under the Articles of War and the facts.

In their true nature the contentions made in this connection when thoroughly analyzed are merely reproductions in another form of the original contentions made on behalf of the accused that the specifications were defective and improper on account of duplicity, and that the one act of drawing two checks was split up into four separate offenses. These alleged errors should have been brought to the notice of the court-martial which had jurisdiction to pass upon them, but the prisoner proceeded to trial, permitted the court to enter on an investigation of the different specifications, and himself brought forward his defense as to each of them. (See opinion of Attorney-General in the Carter case on September 29, 1899, p. 5.) He can not now in a collateral proceeding ask this court to review the supposed error made by the trial court in the exercise of its lawful jurisdiction.

While it has already been shown that four offenses were not carved out of the alleged single act of drawing two checks, yet it will not be out of place to refer to Judge Wallace's opinion when deciding the appeal upon the original habeas corpus proceedings on behalf of the prisoner. The learned judge said:

> It is also proper to state that Congress can, if it sees fit, carve out two or more offenses from a single criminal transaction, and impose cumulative punishment for the different offenses (*Commonwealth* v. *Trickey*, 95 Mass., 559; *United States* v. *Harmison*, 3 Sawyer, 556), and if the court-martial convicted the relator of several offenses for a single criminal transaction, it did

not transcend necessarily the power conferred by the sixtieth article of war.

The court below, in disposing of this branch of the case, said (Rec., p. 107, folio 2121) as follows:

> Nor is the contention now made that Carter committed but one offense, which has been split up into several charges and punishment inflicted therefor.
>
> "A conspiracy to defraud," as alleged in the first charge, and causing "false and fraudulent claims to be made," as alleged in the second charge, and "the statutory embezzlement under section 5488," as alleged in the fourth charge, are separate and distinct offenses dependent upon different facts and requiring different proof, and therefore it can not be said that for the same act the accused has been tried and punished three times. The mere fact that certain acts of the accused were set out in all of the specifications supporting the three charges does not destroy the distinctive character of the offenses charged.

In the second point of the brief of the appellant it is said that the sentence exceeded the jurisdiction of the court-martial because fine *and* imprisonment were imposed, when the court, as it is claimed, was authorized to punish only in the alternative by fine *or* imprisonment. And in connection therein it is asserted that cumulative punishment for the offenses under the sixtieth article of war is not legal. The *Lange Case* is quoted to sustain this claim.

The *Lange Case* (18 Wall., 166) is explained by the

Supreme Court of the United States in the case of *Ex parte Bigelow* (113 U. S., 328) as follows:

> In that case the petitioner had been tried, convicted, and sentenced for an offense for which he was liable to the alternative punishment of fine *or* imprisonment. The court imposed both. He paid the fine, and made application to the same court by writ of habeas corpus for release, on the ground that he was then entitled to his discharge. The circuit court on this application, instead of releasing the prisoner, set aside its erroneous judgment and sentenced him to further imprisonment. This court held that the prisoner having been tried, convicted, and sentenced for that offense, and having performed the sentence as to fine, the authority of the circuit court over the case was at an end, and the subsequent proceedings were void.

It must be remarked that there was a conviction for but one offense in the case quoted, and the want of jurisdiction to impose the second sentence was apparent upon the face of the proceedings, and hence the discharge of the prisoner under the writ.

In the case at bar there are convictions of four separate statutory offenses, the penalty clauses thereunder furnishing ample and sufficient legal warrant for the sentence imposed. The Lange case is, therefore, of no value in either determining the validity of the sentence in this case or in elucidating the question of cumulative punishment.

The accused was convicted of two separate and distinct offenses under the sixtieth article of war. This,

it will be shown, is in itself sufficient legal warrant for the imposition of fine *and* imprisonment in the sentence

In connection therewith it will be necessary at the outset to refer to the procedure of military costs.

In the procedure of courts-martial all the charges pending against an accused are disposed of in one proceeding and the punishment upon all the convictions adjudged in a single sentence.

The practice of courts-martial in respect to trials for distinct offenses is well stated in the opinion of Attorney-General Griggs, reviewing the court-martial proceedings in the case at bar, dated September 29, 1899, as follows:

> It is laid down in works on military law that care should be taken that all the charges and specifications to which the party may be subject be preferred together. Unlike the ordinary criminal procedure, where but one indictment, setting forth (in one or more counts) a single offense or connected criminal transaction, is in general brought to trial at one time, the military usage and procedure permit of an indefinite number of offenses being charged and adjudicated together in one and the same proceeding. And with a view to the summary and final action so important in military cases, whenever an officer or soldier has been apparently guilty of several or many offenses, whether of a similar character or distinct in their nature, charges and specifications covering them all should, if practicable, be preferred together and together

brought to trial. (I Winthrop Mil. Law, 219, 2d ed.)

This practice appears to have been followed uniformly in court-martial proceedings, especially during the late civil war. An instance is cited where in one case sixty-one different acts of offense were grouped together in one proceeding (see the case of Maj. Justus McKinstry, quartermaster, U. S. A., published in General Orders 43, War Department, 1863). It is not necessary to discuss whether this practice is wise or whether it is prejudicial to the rights of the accused. It appears to be established by long-continued practice, and, so far as I am able on investigation to discover, without previous challenge.

From this practice it naturally followed that upon the completion of the hearing and after coming to a finding upon the various charges and specifications, courts-martial proceed to impose a sentence, not in specific terms upon each separate offense of which the accused has been found guilty, but upon the whole conviction.

In respect to this practice text writers have observed:

> In the absence of any statutory direction upon the subject, usage has established that the sentence of court-martial shall be, in every case, an entirety; that is to say, that there shall be but a single sentence covering all the convictions on all the charges and specifications upon which the accused is found guilty, however separate and distinct may be the different offenses found, and however different may be

> the punishment called for by the offense. (1 Winthrop, 614, 2d ed.; Benet, 5th ed., 63; Davis, Mil. Law, 148 et seq., 687.)

In the Digest of Opinions of the the Judge-Advocate-General, page 696, it is stated:

> A punishment adjudged upon conviction of the accused on several charges is valid and operative provided it is a punishment legally imposed, upon conviction of any one of the charges on which the conviction is duly approved.

The sentence in this case has for its basis the penalty clauses of the sixtieth, sixty-first, sixty-second, ninety-seventh, and one hundredth articles of war.

So much of the sentence as imposed fine and imprisonment is covered by the convictions under the first and second charges, irrespective of the conviction under the fourth charge.

It must be observed that the prisoner was convicted under the first two charges, laid respectively under the third and first subdivisions of the sixtieth article of war, each supported by a specification reciting separate and distinct circumstances and offenses. One states facts covering the offense "Conspiring to defraud the United States," and the other recites the circumstances of the offense of "Causing false and fraudulent claims to be made against the Government." Neither of these specifications can be considered as a different statement of the same offense, nor as a different count of the same act; they recite distinct and substantive offenses.

From this state of facts, and from the disjunctive character of the offenses set out in the sixtieth article of war, section 1342, Revised Statutes, it follows that the penalty clause of that article must be considered as applying to each offense separately. A sentence, therefore, of fine for one of the offenses and imprisonment for the other, or of fine and dismissal, or of dismissal and imprisonment, can not be legally questioned, and will be valid. We have, therefore, irrespective of the finding under the sixty-second article of war, a legal basis for a sentence of imprisonment. But this, it is said on behalf of the petitioner, would be imposing a cumulative punishment, which it is claimed is illegal.

There is no merit in this contention, for under military practice and the regulations prescribed by the President so-called cumulative punishment has been always recognized. (See Manual for Courts-martial, p. 45 et seq.; p. 52, art. 4.)

For support in this matter we may refer to the practice of the courts of the land, and more particularly to that of the criminal courts of the United States. Mr. Bishop says:

> The object of permitting several distinct offenses to be charged in the same indictment by means of separate counts is to avert from both parties the burden of two or more trials by permitting them to be tried together. (1st Bishop, C. L., 422.)
>
> When this has been done, i. e., the single trial had, the purpose of the practice is accomplished,

and the court may proceed to sentence as if the defendant had a separate trial for each offense. If then the office of the multiple counts in an indictment is, as a matter of fact, to charge more than one distinct offense, there may be a separate sentence for each offense charged and on which the defendant is convicted, each sentence based upon its corresponding count or counts. (21 Am. and Engl. Ency. Law, 1080, and authorities there cited.)

When there is a series of counts, all good, on which there have been separate verdicts, the court trying the case can impose a separate sentence on each count. That this can be done we have numerous authoritative rulings. (Wharton's Crim. Pl. and Prec., 910, 911, and note 5; 1 Bish. Crim. Law, 1060 and 1062.)

In the case of *United States* v. *Bennett* (17 Blatchford, 361), the indictment charged in different counts different offenses, five under section 5431 and one under section 5434, Revised Statutes. Judge Benedict, in speaking for the United States circuit court for the second district, held:

It is contended that judgment must be arrested because the indictment charges different offenses for which different punishments are prescribed by statutes, and Tweed's case is cited in support of the objection. An examination of the doctrine declared in that case would be out of place here, because the prosecution is instituted under statute of the United States which permits the joinder of different and separate offenses in one indictment in separate counts. * * * No difficulty in regard to

> the judgment to be entered arises from the difference between sections 5431 and 5434, Revised Statutes, in respect to the punishment prescribed. The prisoner has been convicted of the several offenses charged in the indictment. Each count, charging a separate and distinct offense, is, in legal effect, a separate indictment, and a conviction thereon may be followed by sentence imposing such punishment as the statute has prescribed for that offense. The statute in permitting the joinder of different offenses in a single indictment, and even the consolidation of two or more indictments, by necessary implication authorize a separate punishment for each offense proved. Otherwise a conviction of offenses permitted to be joined would be the same in effect as an acquittal.

In this connection and in support of this doctrine the cases of *Ex parte Hibbs* (26 Fed. Rep., 421), and *In re Haynes* (30 Fed. Rep., 764), may also be cited.

In re Geo. Fry (3 Mackey, 138), habeas corpus proceedings before the supreme court of the District of Columbia, the question of cumulative sentences was in issue. Justice Cox, in speaking for the court, said:

> Another point is, whether the justice below has a right to impose cumulative sentences. Here were six informations and six convictions, and each imprisonment under the first was to commence on the expiration of the preceding one, making altogether about three years. It has been held, and was particularly held in the Tweed case, so well known in New York, that where similar offenses are charged in different counts of the indictment and punishment, each

one by confinement in the penitentiary, all the periods of punishment by imprisonment must run concurrently; that it amounts to only one sentence, no matter how numerous the charges; that is, if a man steals a pair of shoes one day, the next day another, and a dozen different offenses are committed, he can not be punished by more than one term of imprisonment for the whole any more than in one case. That doctrine in the Tweed case is repudiated both in England and in this country by the weight of authority, and we are satisfied that the distinct offenses, although of similar character, are set forth in several counts in the same indictment, and, *a fortiori*, if set forth in different indictments or informations, it is in the power of the court to impose cumulative sentences; that is, periods of confinement, each one independent of the other.

In *Ex parte W. F. Peters* (4 Dill, 169), the prisoner was convicted in the United States district court upon four counts in one indictment, setting forth at least two different offenses of a similar character under sections 5469 and 5478 Revised Statutes. He was sentenced to two years' imprisonment on each count, commencing on the expiration of each preceding term. Before the expiration of four years he applied to be discharged on habeas corpus, on the ground that the court had no authority to render cumulative judgments. It was held by Judge Dillon that the judgment of the court when collaterally assailed was not wholly void and was good to the extent of four years' imprisonment at least, and the prisoner was, therefore, remanded. The

question as to the validity of the remainder of the sentence was expressed reserved until it should be presented after four years' imprisonment had expired. After expiration of this period the petitioner renewed his application for discharge upon the writ of habeas corpus and the case came up before Circuit Judge McCreary (see 12 Fed. Rep., p. 62).

The court upheld the conviction and sentences and denied the petitioner's application for release.

In *United States* v. *Callahan* (5 McLean, 596), the court, in discussing the question of joining offenses in the same indictment, remarked:

> It must be admitted, when offenses of the same class may be charged in the same indictment, committed at different times and under different circumstances, that the punishment appropriated to each must be inflicted.

In *Ex parte Hibbs* (26 Fed. Rep., 427) the court held:

> In the case of two distinct offenses arising out of two distinct acts or transactions, however closely related in point of time or place, the trial is for the distinct offenses of which the defendant may be found guilty and receive the maximum for each.

In the case of *Howard* v. *United States*, the circuit court of appeals of the sixth district (75 Fed. Rep., 906) said:

> It is also a recognized method of procedure to consolidate separate indictments and try them at the same time as one case; and it is

not an uncommon thing that the same defendant is convicted of more than one offense at the same term upon separate indictments and trials. And the rule which denies the court the power to impose cumulative sentences turns the trial and conviction on all the indictments, except one, into an idle ceremony. It is hardly necessary to say that a rule which leads to such results as these is unsound in principle and can be supported by no consistent process of reasoning. Under such a doctrine a defendant convicted of two or a dozen crimes would suffer no greater punishment than a person convicted of one offense, except such difference as the statutory maximum or minimum limits on the sentences might justify. Such a rule finds no justification in law or morals. The other cumbersome and uncertain methods suggested for dealing with the subject would, in effect, result in complete failure.

Counsel for the petitioner relies with confidence on *People ex rel. Tweed* v. *Liscomb* (Tweed case), 60 New York, 559, and authorities therein cited. The doctrine in this case, however, has met with universal disapproval. Mr. Bishop speaks of it as "a doctrine elsewhere never heard of before and generally rejected since. * * * We think the power thus to pronounce cumulative sentences exists in regard to felonies as well as to misdemeanors, although in the case at bar we are dealing with the misdemeanor grade of offense only."

In the case of *Carlton* v. *Commonwealth* (5 Met., 532), it was held that where there are more than one count

in an indictment the verdict and the sentence may be separate and distinct as to each offense, yet where there is a general finding by the jury of "guilty," a single sentence may be imposed if it does not exceed the sum of the several sentences set forth in the separate counts of the indictment.

The sentence of the court-martial in this case is valid and operative, because the punishments were legally imposable upon the convictions as approved, viz:

1. Fine, under { either Charge I or Charge II, } Art. 60, sec. 1342, Rev. Stat.
2. Imprisonment, under { either Charge I or Charge II, } Art. 60, sec. 1342, Rev. Stat.
3. Dismissal, under Charge III, article 61, section 1342, Revised Statutes.
4. Fine, imprisonment, and dismissal, under Charge IV, articles 62 and 97, section 1342, Revised Statutes.
5. Publication of offense, etc., under Charge III, and article of war 100, section 1342, Revised Statutes.

The respondent desires to invite the attention of the court particularly to the opinion of Judge Wallace, rendered in the former proceedings, on behalf of Oberlin M. Carter, when they came before the circuit court of appeals, second circuit. In it the learned judge fully sustained the views and authorities advanced by the respondent in the foregoing point, that the penalty clauses of the charges of which the prisoner was convicted amply sustain the sentence imposed.

The opinion in question is as follows:

> It is not contended for the appellant that the court-martial did not have jurisdiction of the person of the accused and of the offenses of which he was convicted; but it is insisted that

the court transcended its power in the imposition of punishment. More specifically the contention for the appellant is that, while it was within the competency of the court-martial to try and punish the relator for the offenses in violation of the sixtieth article of war, of which he was convicted, the court exceeded its authority when it punished him by fine and imprisonment instead of fine or imprisonment; and that the conviction and sentence for the offense alleged to be in violation of the sixty-second article of war were void, because the facts charged did not constitute an offense against that article.

If the sentence was in excess of the authority conferred upon the court by the Articles of War enacted by Congress, it was to that extent void, as the court would have gone beyond its jurisdiction in imposing punishment. On the other hand, if the authority of the court extended to the punishment of the relator by fine and imprisonment upon his conviction of the two offenses in violation of the sixtieth article of war, the sentence defeats any remedy by the writ of habeas corpus, as that remedy reaches only cases of unlawful imprisonment, and it matters not for present purposes whether the authority of the court extended to his conviction and sentence for any other offense. There being no statutory direction upon the subject, usage permits an indefinite number of offenses to be adjudicated together in one proceeding by courts-martial, and the rendition of a single sentence covering all the convictions and imposing punishment accordingly, however separate and distinct may be the different offenses

and however different may be the punishment prescribed for them. (I Winthrop, Military Law, 2d ed. (219, 614); Davis, Military Law, 148, 689.)

It follows that if the sentence is warranted by a conviction of two offenses, it is justified to the extent that such offenses are punishable.

The sixtieth article of war declares, among other things, that a person in the military service of the United States "who enters into any agreement or conspiracy to defraud the United States by obtaining or aiding others to obtain the allowance of any false or fraudulent claim," or "who makes or causes to be made any claim against the United States, or any officer thereof, knowing such claim to be false and fraudulent," * * * "shall on conviction thereof be punished by fine or imprisonment or by such other punishment as a court-martial may judge." The article, besides the two offenses mentioned, defines disjunctively eight others, and the language prescribing the punishment is contained in a concluding clause at the end of the enumeration. We entertain no doubt that the concluding clause is to be read distributively and applies to each of the ten enumerated offenses, and that a person convicted of two or more of the ten offenses is by its terms punishable for each by fine or by imprisonment or by such other punishment as the court-martial may adjudge. Any other construction would attribute to Congress the intention to ignore any distinction between degrees of guilt in punishing crime and to subject a person guilty of one

offense to the same measurement of punishment as one guilty of several or all of the ten offenses.

* * * * *

It is proper to state that the other punishments imposed upon the relator by the sentence were authorized by the Articles of War. The conviction of conduct unbecoming an officer and gentleman was for an offense in violation of article 61, and that article requires that upon conviction the officer be dismissed from the service. The punishment by publication of his crime was authorized by article 100, which provides for such punishment when an officer is dismissed from the service for cause. It is also proper to state that Congress can if it sees fit carve out two or more offenses from a single criminal transaction and impose cumulative punishment for the different offenses (*Commonwealth* v. *Trickey*, 95 Mass., 559; *United States* v. *Harmison*, 3 Sawyer, 556), and if the court-martial convicted the relator of several offenses for a single criminal transaction it did not transcend necessarily the power conferred by the sixtieth article of war.

In dismissing the writ the court below expressed the opinion that the relator was properly convicted by the court-martial of an offense in violation of the sixty-second article of war, and that the sentence of imprisonment was supported by such conviction. Without intending to impugn the correctness of this conclusion, we have not considered the question because in the view we have reached it does not arise. The relator was lawfully restrained of his liberty by

the sentence and commitment pursuant to it, because the sentence was warranted both as to fine and imprisonment by his conviction of one offense subjecting him to punishment by fine and of another subjecting him to punishment by imprisonment, and both in violation of the sixtieth article of war.

The court below said (Record, p. 107, folio 2120):

> * * * The sentence imposed may be upheld on the conviction under the fourth charge alone, since the punishment authorized by the sixty-second article of war is left to the discretion of the court subject to the review of the President. But the decision need not be based upon the regularity of the conviction on the fourth charge alone. There was also a conviction under the first charge for a conspiracy to defraud the United States and a conviction under the second charge for causing false and fraudulent claims to be made, such charges being the subjects of the first and third paragraphs of the sixtieth article of war. I am in entire accord with Judge Wallace, who delivered the opinion of the circuit court of appeals for the second circuit, that under the sixtieth article of war it was competent to impose a fine for one charge of which the accused was found guilty and imprisonment for the other. Therefore, the entire sentence as ultimately pronounced and confirmed can be sustained under the sixtieth article of war without reference to the sixty-second, and for that reason no relief is possible by the suit of habeas corpus.

In the concluding portion of the argument and brief of the appellant upon the questions in this point he says:

> There is just another aspect of this sentence. If the court was without jurisdiction to sentence under Charge IV, as I have herein above shown, then is the penitentiary portion of the sentence utterly void, because of the addition to the phrase "hard labor." The sixtieth article of war provides only for imprisonment, which means at some military garrison and not at any penitentiary. The *Pridgeon case* (163 U. S., 48) is, therefore, not in point.

The "imprisonment" mentioned in the sixtieth article of war is not restricted to confinement at a military post; to the contrary, when the prisoner so sentenced is also sentenced to dishonorable discharge or dismissal the imprisonment decreed is, by regulation of the Army and the statutes, to be suffered in a penitentiary under the limits presented in the ninety-seventh article of war.

The sentence in this case of imprisonment at hard labor in a penitentiary is based upon the ninety-seventh article of war, under the provisions of which a person can be punished by imprisonment in a penitentiary when the offense of which he is convicted will by some statute of the United States subject such convict to such punishment.

Confinement at hard labor in a penitentiary is sanctioned by the penalty clause of section 5488 and section 5438, Revised Statutes, in conjunction with

section 5542, Revised Statutes of the United States; and further, the act of Congress approved March 31, 1895 (28 Stat., 957), admits of the imprisonment and of their employment at hard labor in Fort Leavenworth Penitentiary of prisoners sentenced by court-martial to imprisonment of more than one year.

This statement of the case, coupled with the rule laid down in the Pridgeon case in this court (153 U. S., 48) on the question of "hard labor," shows sufficient authority for the legality of the sentence in this particular, irrespective of the conviction under the sixty-second article of war. (See also Digest of Opinions of Judge-Advocate-General, Ed. 1901, par. 1469.)

POINT IV.

The sentence in this case has been approved by the President, as required by the statute governing this action, and its legality has been confirmed by three courts of the United States. The action of the President upon some of the findings has no bearing upon the legality of the sentence as long as sufficient findings remain to give validity and effect to the sentence. This is in accord with the well-established practice in respect to courts-martial sentences.

In the third point of appellant's brief it is claimed that the "sentence is illegal and void; because the President having disapproved the finding of conviction by court-martial as to certain offenses, or that there was a failure of proof as to them, then having ordered the original sentence to stand, such sentence ceased to be the sentence of the court."

The court-martial for the trial of Capt. Oberlin M. Carter was instituted in orders issued by direction of the President. He became, therefore, the reviewing officer of the record of the court-martial in this case.

On page 5 of his opinion upon this case, addressed to the President, the *Attorney-General* of the United States, on September 29, 1899, remarked upon the matter of the disapproval of findings by the reviewing authority as follows:

> The grounds upon which the authority to disapprove a finding of a court-martial may be properly exercised are very satisfactorily stated by Colonel Winthrop in his treatise on military law, volume 1, page 640. He states that these grounds are mainly of two classes—
>
> Some going to the legal validity or to the regularity of the proceedings and others to the justice or expediency of allowing the judgment to stand or the sentence or punishment to be enforced. Thus where the court was not legally constituted or composed; or was without jurisdiction or the offense or the offender; or proceeded with the trial when below the minimum of members; or where the record discloses irregularities which, though not amounting to fatal defects, are of a gross character; or where the accused has been denied material testimony or otherwise prejudiced in his defense; or the findings or a part of them are unwarranted by the testimony; or the sentence itself is inadequate to the offense, or too severe or quite unmerited, or imposes a punishment not authorized by law—in any such case the reviewing

officer may, in his discretion, withhold his approval from and formally *disapprove* the sentence, in whole or in part, as the law or facts may require or render proper. His discretion, indeed, is here without restriction; its exercise does not depend upon the quality of his reasons, whether or not *any* reasons are stated by him or whether his actual reasons are in point of fact good or sufficient or the reverse, the disapproval is equally effective in law. At the same time he will, of course, not properly disapprove without good reason—without better reason than the court had for the action which he fails to approve. Where, for example, the evidence in the case was conflicting, and it is apparent that the court, having the witnesses before it, must have been the best judge of their relative credibility and of the weight of the testimony, it will, in general, be wiser for the reviewing officer to defer to rather than disapprove its conclusion. Nor will he properly disapprove a sentence on account of a mere error on the part of the court which does not affect the merits or impair the final judgment—as, for instance, an improper rejection of testimony offered by the defense which, however, would have added to the case no material facts.

He then gives his conclusions as to certain enumerated specifications, and says that he is of the opinion that the evidence fails to show satisfactorily fraudulent knowledge and purpose on the part of Captain Carter, and that he should, on that ground, have been acquitted on the said charges. And he therefore *recom-*

mends that the findings of the court-martial as to these particular specifications be disapproved, adding, however, that he is "led to the conclusion that the court-martial was justified in its findings of guilty upon the charges and specifications relating to the contracts of September, 1896, and that the findings and sentence of the court with respect thereto be approved." All these *recommendations* were favorably acted upon by the President as appears from General Orders, No. 172, of 1899, now before this court.

In regard to the reviewing officers' action under the one hundred and fourth article of war, as it read prior to its amendment in the act of July 27, 1892, Colonel Winthrop, in his treatise on Military Law, first edition, volume 1, page 635, says:

> It could not have been designed in the present article to make the approval of the entire proceedings of the court an essential to the legal execution of the sentence, since the reviewing officer might well disapprove as erroneous or ill-judged some interlocutory ruling not affecting the final conclusion, or some *portion of the findings*, or some one or more of several punishments awarded, while *yet properly and legally approving a sentence*, or a punishment or punishments embraced therein. The term "whole proceedings" must, therefore, be construed as meaning material proceedings, i. e., such as are material to the legal enforcement of the sentence as in fact approved.

Ives in his treatise on Military Law, page 183, also holds in effect that, although the reviewing officer has

disapproved the findings to one or more charges and approved others, he may, nevertheless, approve the sentence and direct its execution provided it is sustained and appropriate to the offenses under the approved charges.

The practice which has prevailed in this respect for a long period is also well illustrated in the Digest of the Opinions of the Judge-Advocate-General, edition of 1895, in paragraph 5, page 696, as follows:

> A sentence, to be valid must, of course, rest upon an approved finding of guilty of an offense for which the accused has been tried. Thus, a duly approved finding of guilty on one of several charges, a conviction upon which requires or authorizes the sentence adjudged, will give validity and effect to such sentence although the similar findings and all the other charges are disapproved as not warranted by the testimony.

In an opinion dated October 24, 1864, the late Gen. Joseph Holt, Judge-Advocate-General of the Army, remarked: "It has been repeatedly held by this Bureau (the Bureau of Military Justice, now Judge-Advocate-General's Department), that an irregularity in the findings under one of the several charges does not invalidate the proceedings where the remaining charges are sufficient in force to support the sentence awarded by the court."

In another opinion of the same distinguished jurist, dated April 26, 1865, he says: "* * * Where the finding of guilty upon one of the charges is disapproved by the reviewing officer, the sentence may

be still enforced as supported by the approved finding upon the other charge, provided such sentence as authorized by law is a proper penalty for the specific offense." * * * (Digest of Opinions of Judge-Advocate-General, paragraph 18, p. 350, edition 1868.)

Attention is also invited to an opinion of the same officer dated October 17, 1864, to the same effect and holding that the view stated was well established by frequent rulings upon the point in question.

In later opinion of Judge Holt, dated September 12, 1867, the substance of which is published in the Digest of Opinions of Judge-Advocate-General, paragraph 23, page 343, edition of 1868, it is said that "Where there is a single charge and specification of which the accused is found guilty, which will support the sentence embraced—*held*, that an application after trial to have the proceedings set aside on the ground that the charges on which he was convicted are when taken together inconsistent and incompatible, being the nature of a motion in arrest of judgment, can not be entertained." And he recommended the enforcement of the sentence.

In addition to these opinions as illustrative of the practice discussed in them, general court-martial orders emanating from the War Department and the Headquarters of the Army show many cases tried before courts-martial in which the original sentences imposed were approved, although some of the findings had been disapproved. These precedents cover many years. And the same practice has been followed in cases published in court-martial orders of armies, army corps, divisions, and territorial departments.

The original articles of war governing the action of the reviewing officer of the court-martial record is the sixty-fifth article of the articles enacted by Congress in the act of April 10, 1806 (2 Stat. L., 259), and reads in part as follows: "* * * No sentence of a court-martial shall be carried into execution until after the whole proceedings shall have been laid before the officer ordering the same, or the officer commanding the troops for the time being. * * *"

Upon the revision of the statutes in 1874, the compilers of the Revised Statutes introduced a change in the language of the law, and the foregoing part of the sixty-fifth article of war was made to read under the new enactment as follows: "No sentence of a court-martial shall be carried into execution until the whole proceeding shall have been approved by the officer commanding for the time being," thus requiring an approval of the whole proceedings, when in fact the previously existing law provided only that "no sentence shall be carried into execution until the whole proceedings shall have been laid before the officer ordering" the court.

On December 5, 1890, the Acting Judge-Advocate-General of the Army submitted to the Secretary of War a draft of a bill amending the one hundred and fourth and one hundred and tenth articles of war, in support of which he said: "By the one hundred and fourth and one hundred and tenth articles of war it is required that the sentence shall not be carried into execution until the 'whole proceedings' have been approved by the officer ordering the court, etc. In

practice, however, it has always been held sufficient when enough of the proceedings was approved to justify the sentence, and it should be so, in view, especially, of the fact that the accused persons are often arraigned on several charges and specifications, and that there may be a fatal defect or failure of proof as to some charge of which the accused has nevertheless been convicted, leaving, however, sufficient findings under the other charges to sustain the sentence. As amended, these article of war would simply require the sentence approved." Congress, in the act of July 27, 1892, adopted this recommendation, and the one hundred and fourth article now reads: "No sentence of court-martial shall be carried into execution until the same shall have been approved by the officer ordering the court or by the officer commanding for the time being." This brings the one hundred and fourth article of war into harmony with the provisions of the one hundred and fifth, one hundred and sixth, and one hundred and seventh articles of war, under which approval of the sentence also is required.

This amendment terminated the practice under which the proceedings and findings were required to be formally and expressly acted upon. Nothing more is required under the law as it is in force since 1892 than that the sentence should be expressly approved or disapproved. (Opinion of Judge-Advocate-General of January 2, 1897.)

This is the view taken by the latest text writers on military law in discussing the action of the reviewing officer under the one hundred and fourth article of

war. (1 Winthrop's Military Law, 2d ed., 685 to 693; Davis's Treatise on Military Law, 537–541.)

In *Mills* v. *Martin* (19 Johns, 7 and 30), the validity of a court-martial sentence was involved, and its confirmation under the then existing sixty-fifth article of war, subsequently the one hundred and fourth article of war, Judge Platt, in speaking for the court, held: "It seems clear that every sentence of a court-martial is interlocutory and inchoate until an order of confirmation by the commanding officer. * * * The proceedings of the court-martial were not definitive, but merely in the nature of an inquest to inform the conscience of the commanding officer." This opinion is quoted with approval by this court in the case of *Runkle* v. *United States* (122 U. S., 555).

The sentence in this or in any other court-martial case, in so far as the action of the court is concerned, is in the nature of a recommendation only. Approval is necessary, not only to vitalize the sentence, but to give it substance as material upon which further official action can be predicated. (1st Winthrop's Military Law, 2d ed., 685.) The law, the one hundred and fourth article of war, makes the approval of the sentence by the reviewing officer the only essential requisite to the taking effect of the sentence. (1st Winthrop's Military Law, 2d ed, 686.) The approval so made was final and conclusive in this case.

That the right so to approve the sentence, notwithstanding the disapproval of some of the findings, has been clearly established, not only by the precedents hereinbefore cited, but also by the long-existing prac-

tice in this respect, evidenced by these precedents and supported by the opinions of the Judge-Advocate-General and those of text writers on military law.

In approving certain findings the President has merely followed a previously existing practice, which since the passage of the act of July 27, 1892, has no longer any legal significance in so far as the validity of the sentence is concerned. If he had remained silent in this respect, the legality of his action upon the sentence would not have been affected thereby.

Reviewing officers generally, when no occasion exists to make any remarks as to any particular portion of the proceedings, confine their action to a simple approval of the sentence, without ever mentioning either the proceedings or the findings.

Whether or not the accused was entitled to a *reduction of his punishment* under the *conviction*, as *approved by the President*, is a question which has no bearing upon the validity of the sentence as approved, but addresses itself to the discretion of the President in the exercise of his power of mitigating the punishment. It must, however, be remembered that before he could legally put in force that power it would have been necessary for him first to approve the sentence imposed by the court.

The attorney for the appellant is correct in his assertion that military law is derived from three different sources, namely: First, the Articles of War; second, the Army Regulations; third, the unwritten military law. The latter, he says, was recognized by this court

in the case of *Martin* v. *Mott*. (12 Wheaton, 19.) In this case the court laid down the rule that in the absence of positive enactments courts-martial are bound to execute their duty and regulate their modes of proceeding in accordance with the general usage of the military service, or what might be called the customary military law. This rule applies with the same force to the reviewing officer as it does to the courts under him. The President in his action has not violated this customary law; to the contrary, he followed it when he approved the sentence, notwithstanding his disapproval of certain findings.

In the brief of appellant it is claimed that, finding he could not approve all of the findings, the President should have referred the proceedings back to the court for revision. But this, again, is a matter which addresses itself to his discretion, there being no rule requiring this course of action, as claimed by the appellant's attorney. In this connection it must be remembered that between the date of the adjournment of the court-martial and the review of the case by the President one year and four months had elapsed, a war had taken place, and the members of the court-martial were scattered from the West Indies to the Philippine Islands in Asia, making their reassembling, even if considered desirable, an impossibility.

While courts-martial have their own rules of practice and procedure, and follow in the absence of them the customary military law, their action and that of the reviewing officer can not be judged by the rules governing civil courts, but the practice under military

law of approving a sentence and yet disapproving a number of the findings, as discussed in this point, has a corollary in a rule which is the accepted and settled law for the Federal courts, to the effect that on a conviction on several counts in an indictment and a sentence which did not exceed that which might be given on any one count, if any count were good on error, the court would not reverse.

This is precisely the course which the President has followed, under military law, in his capacity of reviewing officer.

In passing upon this matter the court below (Rec., p. 107, folio 2121) said:

> * * * The rule is well established that when sentence in gross is pronounced upon a conviction under an indictment containing several counts, and upon appeal or review some of these are held bad and the others are mentioned, the sentence will not be disturbed, provided it is such as could lawfully have been imposed under the counts which are upheld.
>
> *Evans* v. *United States*, 584; *Clausen* v. *United States*, 142 U. S., 140; *Haynes* v. *United States*, 101 Fed. Rep., 817 C. C. A.; *Jewett* v. *United States*, 100 U. S., 832; *Peters* v. *United States*, 94 Fed. Rep., 127. In this case what was confirmed by the President is sufficient under the law to justify the imprisonment inflicted.

In concluding the argument upon this point the attention of the court is invited to the fact that the legality of the sentence under the approved findings, and the penalty clauses applicable thereto, was the special

subject of investigation on the part of the circuit court for the southern district of New York, and of the circuit court of appeals for the second circuit. Judge Lacombe held that the dismissal was legal, and that the findings of the fourth charge alone authorized the imposition of fine and imprisonment, while Judge Wallace held that, having found the prisoner to be guilty of two offenses under the sixtieth article of war, "the court was empowered under the statute to punish him as to one by fine, and as to the other by imprisonment. The sentence was not in excess of its authority;" and, further, that "it is proper to state that the other punishments imposed upon the relator by the sentence were authorized by the Articles of War."

POINT V.

It is a general rule that the jurisdiction of a court-martial having once attached by arrest of the prisoner, it retains jurisdiction for all purposes of trial, judgment, and execution. The different provisions of the sentence in this case run concurrently. The status of the accused is now simply that of a public prisoner held by the authority of the United States as an offender against its laws.

It is asserted in Point IV of the brief of the petitioner that the *prisoner having* been dismissed the service of the United States, he is no longer subject to military control and custody, and hence must be discharged from further imprisonment.

The portion of the order quoted at the outset under Point IV of the brief on behalf of petitioner is a part of the necessary action in this case. The sentence awarded by the court was not capable of execution,

under the law, until approved by the President (Articles of War 104 and 106, section 1342, R. S.). It then *became the duty of the Secretary of War* to provide for its execution. This was done in the concluding paragraph of the general orders publishing the proceedings in the case, of which an official copy is made part of the return in this case, by stating the date on which the dismissal took effect, etc. This action is *merely declaratory* of the effect of the sentence, and not a separate and independent act of the Secretary of War having for its object the severance of the prisoner from the service. The different provisions of the sentence took *effect concurrently;* the prisoner was at the time under the control of the military authorities of the United States as a commissioned officer of the Army.

Army Regulations, paragraph 944, prescribes that the term of imprisonment in a sentence begins on the date of the order promulgating it. There is no lapse of time between the date of the order, date of dismissal, and date of beginning of imprisonment.

The claim made in this point is wholly without merit and violates the first principles of jurisdiction. The Constitution gives Congress power to make rules for the government and regulation of the land forces and under this grant Congress enacted the Articles of War, in which it provided that upon conviction for certain of the offenses therein named, various punishments may be imposed. Among these are dismissal and imprisonment.

The accused was proceeded against as an officer of the Army. *Jurisdiction attached* when he was in that

status and included, therefore, not only the power to hear and determine the case, but also the right to pronounce the sentence of the law and the *power to execute* and enforce what has been decreed.

The fact that the officer or soldier being sentenced with the confinement to dismissal or dishonorable discharge, and has been accordingly dismissed or discharged, affects in no manner the due course of the execution of the punishment. The military jurisdiction having once duly attached in his case while he was an officer or soldier, and he having been as such duly tried, convicted, and the sentence of confinement having been duly approved, it is immaterial to its execution whether he actually remains or not in the military service, his status being now simply that of a public prisoner held by the authority of the United States as an offender against its laws. (1 Winthrop, 646.) In the case of *Barrett* v. *Hopkins* (7 Fed. Rep., 312), the court held that the jurisdiction of the court-martial having once attached by arrest of the prisoner, it retains jurisdiction for all purposes of trial, judgment, and execution. In delivering the opinion of the court, Circuit Judge McCreary said:

> That the prisoner was a soldier of the United States Army at the time he committed the offense, and that he was lawfully arrested and imprisoned by military authority and remained lawfully in the custody of the military from September 6, 1878, to February 1, 1879, is admitted. But it is insisted that on the last-named day he ceased to be a soldier by the

expiration of his five years' term of enlistment and became a citizen, and therefore entitled to trial by jury. Congress, under its powers to make rules for the government of the Army and Navy, has power to provide for the trial by courts-martial of "cases arising in the land or naval forces." (Fifth amendment of the Constitution.) The case of the prisoner clearly arose in the land forces within the meaning of the Constitution. He was a private soldier, on duty with his command, and he committed an assault upon a fellow-soldier. Congress had power, therefore, to confer upon a court-martial jurisdiction over the offense. The jurisdiction is plainly conferred by the sixty-second article of war. * * *

The proceedings against the prisoner having been instituted while he was clearly within the jurisdiction of the military authority by the preferring of the charges and by his arrest, as well as by the forwarding of the charges to headquarters, with an application for the appointment of a court-martial for his trial, the question for determination is, Did that jurisdiction cease and expire at the end of the prisoner's term of enlistment, so that all proceedings after that date were void?

The general rule is that when the jurisdiction of a court attaches in a particular case by the commencement of proceedings and the arrest of the accused, it will continue for the purposes of the trial, judgment, and execution. This rule has long been recognized by the War Department as applicable to cases properly instituted before a legally constituted military court-martial,

and in which, before the conclusion of proceedings, the term of enlistment of the accused expires. (Winthrop's Dig. Op. of Judge-Advocate-General, 1880, p. 210.)

The general rule is grounded in sound reason. Many of the greatest military offenses are not cognizable by the courts of common law. A soldier might be guilty on the eve of the expiration of his term of enlistment of the grossest insult to his officers, or of disobedience of orders, or of desertion in the face of the enemy, and if he could not be held for trial after the end of his term he would escape punishment altogether. To hold that in every such case the jurisdiction of a court-martial would cease with the expiration of the term of enlistment would be to shield the guilty from punishment, to encourage crime, to greatly demoralize the military service. The jurisdiction, therefore, in such cases is to be maintained upon the highest considerations of public policy.

But such considerations are not alone sufficient to support the jurisdiction of a court which has power to deal with life, liberty, and property. The jurisdiction of a criminal court must rest upon sound principles of law and not merely upon consideration of public interest and convenience. It frequently happens that the guilty go acquitted because there is no lawful mode of trial and punishment provided. The jurisdiction in the cases named, and in many others of like character, must therefore be upheld upon the ground first mentioned, to wit, that the

> court-martial acquired it by the proper commencement of proceedings, and could not be divested of it by any subsequent change in the *status* of the accused; and this reason applies as well to a case where the crime is one known to the common or statute law as to one in which the offense is purely military. In both the jurisdiction is mentioned, after the end of the term of enlistment, upon the same ground. This conclusion is supported by judicial interpretation in the only cases, so far as I know, in which the case has arisen. (*United States* v. *Travers*, 2 Wheeler, 509; *In re Dew*, 25 L. R., 540; *In re Bird*, 2 Sawy., 33; *In re Walker*, 3 Am. Jurist, 281.)

Upon establishing the military prison at Fort Leavenworth, Kans., Congress, in the act of March 3, 1873, section 1361, Revised Statutes, provided that—

> All prisoners under confinement in said military prison undergoing sentence of courts-martial shall be liable to trial and punishment by courts-martial, under the Rules and Articles of War, for offenses committed during said confinement.

The statute was judicially passed upon by the United States district court of Kansas in the case of *Ira Wildman* (Fed. Cases, 17653a), who had been dishonorably discharged in connection with the sentence of imprisonment, and had been tried under the statute quoted by a court-martial for certain offenses and sentenced to additional imprisonment. Application for release on writ of habeas corpus was made, but denied

on the ground that though no longer in service he was a military prisoner and for purposes of discipline and punishment connected with the military service, that his case is to be regarded as one arising in the land forces in the sense of the Constitution, and therefore one in regard to which Congress may exercise its power of regulation and government.

The same case came before Attorney-General Devens, who, in his opinion of March 26, 1879, concurred in the opinion of the court in the Wildman case:

In *Re Craig* (70 Fed. Rep., 971), a similar case, the court held that:

> Prisoners under confinement in military prisons undergoing sentence of courts-martial, although dishonorably discharged, are nevertheless liable to trial and punishment for offenses they may commit during their confinement, and the act of Congress of March 3, 1873, permitting such trials, is not in conflict with the fifth amendment to the Constitution.

(See 16 Opinions Attorney-General, 292; *In re Bogart*, 2 Sway., 396; Fed. Cases, 1596; *Ex parte Wildman*, Fed. Cases, 17653-a.)

The act of March 2, 1895 (28 Stats., 951), transferred the military prison at Fort Leavenworth from the War Department to the Department of Justice, to be known as the United States Penitentiary, and provided for the confinement of persons "convicted by courts-martial of offenses now punishable by confinement in a penitiary and sentenced to terms of imprisonment of more than one year."

This is the prison in which the prisoner is serving his imprisonment.

This court, in the case of *Coleman* v. *Tennessee* (97 U. S., 915), held that a soldier who had been convicted of murder and sentenced to death by a general court-martial in 1865, but the execution of whose sentence had been meanwhile deferred by reason of his escape and the pendency of civil proceedings in his case, might at the date of the ruling (October term, 1878) "be delivered up to the military authorities of the United States, to be dealt with as required by law."

More recently in the same case (May, 1879, 16 Opinions, 349) it has been held by the Attorney-General that a death sentence might legally be executed, notwithstanding the fact that the soldier had meanwhile been discharged from the service; such discharge, while formally separating the party from the Army, being viewed as not affecting his legal status as a military convict. But, in view of all the circumstances of the case, it was recommended that the sentence be commuted to imprisonment for life or a term of years. The sentence was finally commuted to imprisonment for twenty years.

In the case of *Bogart* (2 Sawy., 307), who was detained for trial before a naval court-martial for embezzlement, in violation of the act of March 2, 1863, it was held, in the opinion of the court discharging the writ of habeas corpus granted for alleged illegal detention, that a person charged with embezzlement under the act cited committed while employed in the naval service and afterwards dismissed or discharged

was liable, under the second edition of said act, to be arrested and tried by a court-martial in the same manner as if he had not been discharged or dismissed. (See concluding portion of article 14, section 1624, Revised Statutes.)

Said second section reads as follows: "And if any person, being guilty of any of the offenses aforesaid while in the military service of the United States, receives his discharge or is dismissed from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court-martial in the same manner and to the same extent as if he had not received such discharge nor been dismissed."

It will be observed that the act here cited is the basis of the present sixtieth article of war, section 1342, Revised Statutes, under which the accused in this case was tried and convicted of two specific offenses.

In the *Esmond case* (5 Mackey, 74) the prisoner was sentenced by court-martial to dishonorable discharge and one year's confinement in the penitentiary. Under habeas corpus proceedings before the supreme court of the District of Columbia the sentence was held to be legal.

In the case of *Ex parte Mason* (105 U. S., 696), who was sentenced by a general court-martial to dishonorable discharge, forfeiture of pay, and eight years' imprisonment in the Albany penitentiary, the legality of the punishment imposed was questioned in the application for release on habeas corpus, but the application

was denied and the sentence held to be legal by this court.

The case of an enlisted man sentenced to dishonorable discharge and confinement at hard labor for a definite period, is analogous to that of an officer sentenced to be dismissed and to be confined in the penitentiary. In point of fact, the dismissal in the one case is equivalent to the dishonorable discharge in the other. The principle of amenability to jurisdiction in both cases is the same and rests on the same foundation.

The identical point four now made in brief on behalf of petitioner in this case, and the identical answer made thereto in point five of this brief for the respondent, was considered by the circuit court of appeals for the second district in the case of *Carter* v. *Roberts*, and Judge Wallace held in respect thereto, as stated in his opinion, as follows:

> The appellant has urged the proposition that the relator, having been dismissed from the service, was not therefore amenable to military authority. If by this is meant to be said that he was no longer lawfully in custody under the sentence of imprisonment, the proposition has not sufficient color of merit to require discussion.

POINT VI.

The President has not fixed the limits to the punishment of officers of the Army by courts-martial upon conviction of offenses under any of the articles of war, leaving the punishment to the discretion of the court.

In the fifth point of appellant's brief it is asserted that the sentence of the court-martial was beyond its

powers, illegal and void, because the punishment assessed therein exceeded the maximum punishment fixed by the President of the United States, in accordance with the law. It is also claimed that allegations to the same effect are made in the petition before the court below and are not traversed in the return. Reference is again made to the treatment of this subject in the statement of this brief where it is clearly shown that the return in the case denied this and all other allegations relating to the sentence. The act of Congress approved September 21, 1890 (27 Stat. L., 491), provides that, "Whenever by any of the Articles of War for the government of the Army the punishment and conviction of any military offense is left to the discretion of the court-martial, the punishment therefor shall not, in time of peace, be in excess of a limit which the President may prescribe."

The enactment is copied into article 938 of the Army Regulations of 1895, now in force, and there is added to it the following clause: "The limits so prescribed are set forth in the Manual of Courts-Martial published by authority of the Secretary of War."

Army Regulations are full of paragraphs embodying verbatim provisions of statutes for the information of the Army, for the exigencies of the service do not admit the carrying about on the part of officers, etc., of ponderous volumes of Revised Statutes and of the Statutes at Large.

Let us bear in mind that there can be no other limit under the statute cited than that fixed by the President.

On February 26, 1891, the President published in

an Executive order his first code of limitations of punishment, which was promulgated to the Army in General Orders, No. 21, Headquarters of the Army, Adjutant-General's Office, Washington, D. C., February 27, 1891, and in the first paragraph of his code the President says: "In accordance with an act of Congress approved September 27, 1891, the following limits to the punishment of enlisted men, together with the accompanying regulations, are established for the government in time of peace of all courts-martial and will take effect thirty days after this order."

Nowhere in the orders are its provisions extended to commissioned officers, and the entire structure of it clearly shows that it solely relates to the cases of enlisted men.

This Executive order was amended by President Cleveland on March 20, 1895, and was again amended by Presideat McKinley on March 30, 1898, and the latter has been in force ever since. The former is to be found in the Manual for Courts-Martial, published by direction of the Secretary of War, edition of 1895. In neither of the Executive orders of the Presidents named has the original purpose of confining the action taken to the punishment of enlisted men been changed or modified.

So that it may be asserted without fear of contradiction that no limit of punishment for commissioned officers is in existence, or has ever been fixed, under the act quoted and the regulation cited by the petitioner in support of his assertion. But even if the limits of punishment described in the executive order

now in force, herein mentioned, were applicable to the cases of commissioned officers, they would not afford any help to the prisoner, for in that order the President fixes the maximum punishment for violation of the sixtieth article of war to four years' confinement at hard labor, and a like period of confinement is fixed for embezzlement of more than $100 under the sixty-second article of war. The prisoner has been convicted of embezzlement of more than $575,000 and a violation of the sixtieth article of war, and he would thus be subject to a maximum punishment of eight years.

From all this it follows that the contention in fifth point of brief on behalf of appellant is without foundation and merit.

Judging from the fact that the opinion of the court below omitted to refer to this objection, it follows from the concluding portion of the opinion of the court that it did not merit consideration.

POINT VII.

It was not admitted in the record that no evidence whatever was delivered before the court-martial tending to show the guilt of Oberlin M. Carter.

In the sixth point the attorney for appellant again claims that the return failed to deny the allegation in the petition that there was no evidence adduced before the court-martial that crime had been committed by Oberlin M. Carter, and that therefore, by the well-known rule of pleading, the accused stands acquitted.

The utter fallacy and groundlessness of this claim has been thoroughly shown by the appellee in his

statement of the case that it is deemed unnecessary specially to discuss this matter again. It is, however, to be remarked that the question of the guilt or innocence of the accused under the evidence adduced was not in issue before the court below. The determination of this question belonged to the trial court and the reviewing officer, and the court below in a habeas corpus proceeding is without jurisdiction in these particular premises, for it is a well-settled rule that the writ of habeas corpus was not framed to retry issues of fact or to review the proceedings of a legal tribunal. (Church on Habeas Corpus, 350.)

POINT VIII.

The judgment of the circuit court discharging the writ of habeas corpus and remanding the prisoner to the custody from whom he was produced should be affirmed.

JOHN K. RICHARDS,

Solicitor-General.

JOHN W. CLOUS,

Special Assistant to the Attorney-General.

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No. 251.

Reply Brief of Attorney General (Richards & Olcott) for Appellant.

Filed Dec. 11, 1901.

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

I. STANTON CARTER, ON BEHALF OF Oberlin M. Carter, appellant,
v.
ROBERT W. MCCLAUGHRY, WARDEN, etc.
} No. 251.

BRIEF IN REPLY FOR THE APPELLEE.

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BRIEF IN REPLY FOR THE APPELLEE.

With reference to the third charge, we call the attention of the court to what is said in second Winthrop's Military Law, second edition, top page 1116:

> It is to be remarked that while article 62 is intended to cover only offenses not cognizable under the other articles, article 61 embraces offenses made punishable by *any other article*, provided such offenses be characterized in their commission by circumstances so dishonorable or disgraceful as to bring them within the definition of "conduct unbecoming an officer and a gentleman."

Such offenses, it is pointed out, may be presented under both articles.

Passing by other points as to military procedure referred to in the reply brief for the appellant, for the reason that in our opinion they have already been sufficiently discussed, let us briefly refer to the new propositions advanced.

I.

It is now for the first time insisted that if the contracts of 1896 were fraudulent—that is, were secured in pursuance of a conspiracy on the part of Carter and the contractors to defraud the Government—then no matter how fraudulent and criminal the conduct of Carter was during the execution of these contracts, such conduct can not be punished because the contracts were void *ab initio*. This is a remarkable proposition. According to this, fraud carries with it indulgence; any acts done in carrying out a conspiracy to defraud are committed with impunity. Is it necessary to call attention to the fact that those who conspire may be punished not only for the conspiracy, but for the criminal acts committed in carrying it out? Or to the other rule, that no man can take advantage of his own wrong, and that the contracts of 1896, however fraudulent in intent, were yet valid and binding in favor of the Government as against the conspirators? Carter may have committed a crime in conspiring with the contractors to secure them contracts at extravagant prices, and then he may have committed an additional crime in fraudulently accepting work and material which he knew was not in accordance with the specifications of these contracts, but different in quality and cost, and still another crime in fraudulently approving and paying false accounts for alleged work done and material furnished under the contracts.

II.

It is insisted that because article 62 has been in force since the Revolution and section 5488 was enacted as late as 1866, the offense described in the latter section can not be incorporated into or charged under the former article. But article 62 is a comprehensive provision, and the charge of "embezzlement as defined in section 5488, Revised Statutes," is merely a short method of referring to certain acts described in the specification. These words may be rejected as surplusage. The charge is really that Carter committed an offense in violation of the sixty-second article of war, namely, an offense to the prejudice of good order and military discipline "not mentioned in the foregoing Articles of War." This offense is described in the specification. It is averred that Carter, being the officer in charge for the United States of the river and harbor improvements in the Savannah district, and as such, being a disbursing officer of the United States, and having intrusted to him large amounts of public money of the United States, "did willfully and knowingly apply for a purpose not authorized by law large sums of the said moneys so intrusted to him" by willfully and knowingly causing certain amounts to be paid out of such moneys, the accounts on which the same were paid being false, and the amounts paid not being due or owing from the United States to the parties or to anyone, and Carter well knowing this to be the case.

Now, it is perfectly proper to attack this specification, as was done by opposing counsel on the oral argument, by insisting either that the offense was not to the prejudice of good order and military discipline or was covered by the sixtieth article of war. But it is possible to overthrow it on no other ground.

III.

It is urged that Carter was not a disbursing officer; that he was a purchasing agent; and that what he has been convicted of was a mere error of judgment in passing upon the quality of certain materials. This is another of the astonishing propositions which one is at a loss adequately to characterize. Because section 5488 (according to counsel's contention) might be construed in some other case to cover a misapplication of Government funds without fraudulent intent, therefore it is insisted that Carter has been convicted of a mere error of judgment, notwithstanding the fact that the court-martial, in finding him guilty, determined in every instance that he had acted with fraudulent intent. Every charge and specification sustained and upon which the sentence now rests contains the definite and distinct averment that he acted with fraudulent intent.

The first charge is that *he conspired to defraud the United States* by aiding the Atlantic Contracting Company to obtain the payment of certain fraudulent claims in violation of the sixtieth article of war.

The second charge is that *he caused certain false and fraudulent claims to be made against the United States*

by permitting the Atlantic Contracting Company to furnish work and material different from and inferior to that contracted for, and by falsely certifying to the vouchers therefor, in violation of the sixtieth article of war.

The third charge is that *he willfully caused certain accounts to be paid out of the moneys of the United States* subject to his control, *the accounts being false*, and he well knowing this to be the fact, in violation of the sixty-first article of war.

The fourth charge is that Carter, being the officer in charge of the improvements in the Savannah district, and, as such, a disbursing officer of the United States, and having intrusted to him large amounts of public money, *did willfully and knowingly apply for a purpose not authorized by law large sums of such money*, by causing certain amounts thereof to be paid out *on certain accounts which were false*, and which he knew were false, the amounts paid not being due or owing from the United States to the parties or to anyone, in violation of the sixty-second article of war.

One can not hear or read the extraordinary propositions of counsel without recalling the words of Danton:

> Il nous faut de l'audace, et encore de l'audace, et toujours de l'audace.

IV.

The penalty clause which applies upon conviction attaches not to the specifications but to the charge. There were four charges and many specifications. A

number of specifications were eliminated by pleading the statutes of limitations. The court found Carter guilty of the first charge and one specification under it; of the second charge and five specifications under it; of the third charge and nine specifications under it; and of the fourth charge and one specification under it. Upon the recommendation of the Attorney-General (22 Opinions, 589), the President approved of all these findings except specifications 7, 8, 9, and 10, under charge two, which the court will find upon examination were of minor importance, and specifications 3, 4, 5, 6, 7, 9, 11, and 22, under charge three, which were obviously immaterial for the reason that under the charge there could be but one punishment inflicted, that of dismissal. Thus there remained, approved by the President, a conviction under each charge supported by one specification. It is to be observed that each of these charges grew out of the same general transaction, the conspiracy to defraud through the contracts of October 8, 1896, for the improvement of Savannah Harbor and Cumberland Sound. The false and fraudulent claims which Carter caused to be made, and thereafter willfully and knowingly paid, and the moneys of the Government which he willfully and knowingly misapplied were large in amount, in the Savannah Harbor contract, $230,749.90, and in the Cumberland Sound contract, $345,000.

If, therefore, the punishment inflicted was not in excess of the maximum possible under valid charges, the

sentence must be sustained The ends of justice so require. It is not to be presumed that even if there had not been, for example, a conviction under the fourth charge, the sentence would have been different. The *Ballew case* (160 U. S., 187) was remanded in the exercise of statutory authority and in furtherance "of substantial justice." There is no statute warranting such a course in this case and substantial justice would be defeated instead of promoted by applying it. To what tribunal could this case be remanded for a new sentence under the rule in the *Ballew case?* To the court-martial? But the sentence of the court-martial was merely provisional. It amounted to a mere recommendation. It took effect only upon the approval of the President. The President, therefore, really pronounced the sentence, and under the pardoning power the President has authority at any time to mitigate it, if the ends of justice should so require. There is no room here for the application of the rule in *Ballew's case.* The decision in the *Ballew case* has not been regarded as overruling the well-settled rule of the Federal courts, that where there is a verdict of guilty upon a number of counts and the sentence imposed does not exceed that which might properly have been imposed upon conviction under any single count, such sentence is good if any such count is found to be sufficient. *Claassen* v. *United States*, 142 U. S., 140, 146; *Evans* v. *United States*, 153 U. S., 595, 609; *Peters* v. *United States*

(1899), 94 Fed. Rep., 127, 134; *Jewett* v. *United States* (1900), 100 Fed. Rep., 832, 836. This court denied applications for certiorari in both the *Peters* (176 U. S., 684) and the *Jewett* (179 U. S., 683) cases.

JOHN K. RICHARDS,
Solicitor-General.

JOHN W. CLOUS,
Special Assistant to the Attorney-General.

O

Supreme Court of the United States.

No. 251.—October Term, 1901.

I. Stanton Carter (on behalf of Oberlin M. Carter), Appellant,
vs.
Robert W. McClaughry, Warden of the United States Penitentiary at Fort Leavenworth, Kansas.

Appeal from the Circuit Court of the United States for the District of Kansas.

[January 6, 1901.]

This was a petition for the writ of *habeas corpus* filed on behalf of Oberlin M. Carter in the Circuit Court of the United States for the District of Kansas, October 17, 1900, on which the writ was issued returnable October 26.

The petition alleged that Carter was imprisoned and restrained of his liberty by the warden of the United States prison at Fort Leavenworth, Kansas, by virtue of a sentence imposed upon him by a general court martial of the United States, approved by the Secretary of War, and approved and confirmed by the President of the United States on the 29th day of September, 1899.

That the warrant under which the warden detained petitioner was an order from the headquarters of the army, that is to say, General Orders No. 172, dated September 29, 1899, and set forth at length.

From this it appeared that Captain Oberlin M. Carter, Corps of Engineers, United States Army, was arraigned and tried before a general court martial on four charges with specifications under each.

To the first specification of Charge I; the first, second, third, fourth and fifth specifications of Charge II; the first, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth and twenty-first specifications of Charge III; and the second specification of Charge IV, he pleaded the statute of limitations, the one hundred and third article of war, and the plea was sustained by the court. To the charges and the other specifications he pleaded not guilty, and was found not guilty on the eighth, tenth, twelfth and twenty-third specifications under Charge III.

Omitting the above specifications and abbreviating those disapproved by the President as stated hereafter, the charges and specifications were as follows:

Charge I.—"Conspiring to defraud the United States, in violation of the 60th article of war."

Specification II.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, devising and intending to defraud the United

States and to aid the Atlantic Contracting Company, a corporation, and John F. Gaynor, William T. Gaynor, and Edward H. Gaynor, and Anson M. Bangs, and divers other persons, all of whom were likewise with him, the said Carter, devising and intending to defraud the United States, did, with the corporation and persons named, unlawfully combine and conspire to defraud the United States of divers large sums of money by aiding the said The Atlantic Contracting Company to obtain the allowance and payment of certain false and fraudulent claims hereinafter described; and in pursuance of the said conspiracy the said Oberlin M. Carter, in the months of June, July, and August, September and October, 1896, being an officer of the United States in charge of the river and harbor district usually called the Savannah district, and of the improvement by the United States of rivers and harbors in said district, did, with the knowledge and consent of the said other parties named, so advertise for proposals for contracts for certain works of improvement in the harbor of Savannah, Georgia, in said district, and so manage and conduct said advertising, and the matter of giving out information in regard to the contract to be let, and the matter of receiving proposals and awarding the contract, as to enable the said The Atlantic Contracting Company to secure the contract for said work, and to have the same entered into by the United States with it October 8, 1896; and in further pursuance of the said conspiracy the said The Atlantic Contracting Company afterwards, to wit, from about the 8th day of October, 1896, to July 31, 1897, did furnish and put into said work certain mattresses, stone and other material which were different in kind and character from the mattresses, stone and other material contracted for in said contract, and very much less costly to the said The Atlantic Contracting Company as well as of less value to the United States; which said mattresses, stone, and other material so furnished and put into the work the said Captain Carter, in further pursuance of said conspiracy, did receive and accept, and cause to be received and accepted, for the United States, as and for the mattresses, stone, and other material contracted for; and did, on or about July 6, 1897, cause to be paid, out of the moneys of the United States, $230,749.90 to the said The Atlantic Contracting Company on account of the said furnishing and delivery of the same, and as if the said mattresses, stone and other material had been such as were stipulated for in the contract, and at the same rate, cost and price as if they had been.

"And in further pursuance of the said conspiracy the said Captain Carter, about June, July, August, September and October, 1896, did advertise for proposals for a contract for improving Cumberland Sound, Georgia, in said river and harbor district, and so manage and conduct the matter of such advertising, and the matter of giving out information in regard to the contract to be let, and the matter of receiving proposals and awarding the contract, as to enable the said The Atlantic Contracting Company to secure the contract for said work and to have the same entered into by the United States with it October 8, 1896; and in further pursuance of the said conspiracy the said The Atlantic Contracting Company, from about the 8th day of October, 1896, to the 31st day of July, 1897, did furnish and put into said work certain mattresses, stone and other material which were different in kind and character from the mattresses, stone and other materials contracted for in said contract, and very much less costly to the said The Atlantic Contracting Company, as well as of

less value to the United States; which said mattresses, stone and other material so furnished and put into the work the said Captain Carter, in further pursuance of said conspiracy, did receive and accept, and cause to be received and accepted, for the United States, as and for the mattresses, stone and other material contracted for; and did, on or about July 6, 1897, cause to be paid, out of the moneys of the United States, $345,000.00 to the said The Atlantic Contracting Company, on account of said furnishing and delivery of the same, and as if the said mattresses, stone and other material had been such as were stipulated for in the contract and at the same rate, cost and price as if they had been.

"This on the 6th day of June, 1896, and thereafter to the 1st day of August, 1897."

Charge II.—"Causing false and fraudulent claims to be made against the United States, in violation of the 60th article of war."

Specification VI.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, being at the time the officer in local charge of river and harbor improvements in the Savannah River and harbor district, did cause to be made certain false and fraudulent claims against the United States and in favor of the Atlantic Contracting Company, a corporation, knowing the same to be false and fraudulent, to wit: The claim represented by the following voucher, submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving harbor at Savannah, Georgia:'

Voucher No. 8, $230,749.90, July, 1897;

and the claim represented by the following voucher submitted by the said Captain Carter with his accounts, and marked 'Appropriation for improving Cumberland Sound, Georgia and Florida:'

Voucher No. 9, $345,000.00, July, 1897;

which said false and fraudulent claims the said Captain Carter caused to be made by knowingly permitting the said Atlantic Contracting Company, which had previously entered into contracts, dated October 8, 1896, to furnish the United States certain mattresses, stone and other material, of specified kinds and qualities, for constructing works in said river and harbor district, to furnish and put into said works, mattresses, stone and other material different from, inferior to, cheaper and of less value to the United States than those contracted for; and by receiving and accepting and paying for the same as of the kinds and qualities contracted for, and by falsely certifying to the correctness of the said vouchers, well knowing that the mattresses, stone and other material charged for in said vouchers as having been furnished, had not in fact been furnished; each of the said claims having been made in or about the month named in the above description of the voucher relating to it."

Specification VII.—In that the accused caused to be entered on a government pay roll the names of sundry persons as laborers, and caused to be paid to them certain sums for services as laborers, whereas none of such persons had rendered services as laborers, and the accused knew such claims were false and fraudulent.

Specification VIII.—For fraudulently allowing an account of $121.60 of the Atlantic Contracting Company against the United States for piling in repairing the Garden Bank training wall.

Specification IX.—For fraudulently allowing an account of $384 to the Atlantic Contracting Company for pile work.

Specification X.—For fraudulently allowing an amount of $108.80 to the Atlantic Contracting Company for pile dams.

Charge III.—"Conduct unbecoming an officer and a gentleman, in violation of the 61st article of war."

Specification II.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, being the officer in local charge for the United States of river and harbor improvements in the Savannah river and harbor district, did wilfully and knowingly cause the following amounts to be paid out of the moneys of the United States subject to his order and control as officer in charge of said improvements to the Atlantic Contracting Company, a corporation; the accounts on which the same were paid being false, and the amounts paid not being due or owing from the United States to the said company, or to any one, and he, the said Captain Carter, well knowing this to be the case; the said accounts and amounts paid and the payments being those designated by the following voucher (and the entries therein and endorsements thereon), submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving harbor at Savannah, Georgia':

"Voucher No. 8, $230,749.90, July, 1897; and the one indicated and designated by the following voucher (and the entries therein and endorsements thereon), submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving Cumberland Sound, Georgia and Florida':

"Voucher No. 9, $345,000, July, 1897; each of the said payments having been caused to be made on or about July 6, 1897, by the said Captain Carter drawing and delivering a check as such officer in charge of river and harbor improvements, by which the payment was ordered and directed to be made out of moneys of the United States under his control as such officer."

Specification III.—For making a false statement to the Chief of Engineers as to new soundings for work in Savannah harbor, with intent to deceive.

Specification IV.—For falsely entering on the pay roll the names of certain persons as laborers to an amount of $29.50.

Specification V.—For falsely certifying as correct an account of the Atlantic Contracting Company for $121.60.

Specification VI.—For falsely certifying as correct an account of the Atlantic Contracting Company for $384.

Specification VII.—For falsely certifying as correct an account of the Atlantic Contracting Company for $108.80.

Specification IX.—For endorsing a certain false statement on a letter from the Chief of Engineers as to rentals on property proposed to be acquired by the United States at Savannah.

Specification XI.—For failing to account for the sum of $132.10, money of the United States, received by the accused from Alfred Hirt.

Specification XXII.—For making false reports as to his absence from his station.

Charge IV.—"Embezzlement, as defined in section 5488, Revised Statutes of the United States, in violation of the 62d article of war."

Specification I.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, being the officer in charge for the United States of river and harbor improvements in the Savannah River and harbor district, and, as such officer, in charge of said improvements, being a disbursing officer of the United States, and having entrusted to him large amounts of public money of the United States, did wilfully and knowingly apply for a purpose not authorized by law large sums of the said moneys so entrusted to him, by wilfully and knowingly causing the amounts hereinafter named to be paid out of the said moneys which were subject to his order and control of such officer in charge of said improvements; the accounts on which the same were being paid being false, the amounts paid not being due or owing from the United States to the parties paid, or to any one, and he, the said Captain Carter, well knowing this to be the case; the said accounts, the amounts paid, and the payments being those designated by the following voucher (and the entries therein and the endorsements thereon), submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving harbor at Savannah, Georgia':

"Voucher No. 8 ($230,749.90), July, 1897;

and the one indicated and designated by the following voucher (and the entries therein and endorsements thereon), submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving Cumberland Sound, Georgia and Florida';

"Voucher No. 9 ($345,000.00), July, 1897;

each of the said payments having been caused to be made on or about July 6, 1897, by the said Captain Carter drawing and delivering a check as such officer in charge of river and harbor improvements, by which the payment was ordered and directed to be made out of moneys of the United States under his control as such officer."

The court martial found the accused guilty of the second specification under Charge I, "except the words 'and other material' and interpolating the word 'and' between the words 'mattresses' and 'stone' wherever those words occur in the specification, of the excepted words not guilty and of the interpolated word guilty;" and guilty of the charge; guilty of the sixth specification under Charge II, "except of the words 'and other material' where they occur the second and third time and interpolating the word 'and' between the words 'mattresses,' and 'stone' where they occur the second and third time; of the excepted words not guilty; of the interpolated word guilty;" guilty of the seventh, eighth, ninth and tenth specifications, and guilty of the charge; guilty of the second, third, fourth, sixth, seventh, ninth, eleventh, and twenty-second specifications under Charge III, of the fifth specification, "except of the words 'the articles have been' and of the excepted words not guilty;" and not guilty of the

eighth, tenth, twelfth and twenty-third specifications; and guilty of the charge; guilty of the first specification under Charge IV, and guilty of the charge.

The general order then set forth the sentence and subsequent action as follows:

"*Sentence.*

"And the court does therefore sentence the accused, Captain Oberlin M. Carter, Corps of Engineers, United States Army, 'to be dismissed from the service of the United States, to suffer a fine of five thousand dollars, to be confined at hard labor at such place as the proper authority may direct for five years, and the crime, punishment, name and place of abode of the accused to be published in the newspapers in and about the station and in the State from which the accused came, or where he usually resides.'

"The record of the proceedings of the general court martial in the foregoing case of Captain Oberlin M. Carter, Corps of Engineers, having been submitted to the President, the following are his orders thereon:

'The findings of the court martial in the matter of the foregoing proceedings against Captain Oberlin M Carter, Corps of Engineers, U. S. Army, are hereby approved as to all except the following:

'Charge 2. Specifications seven, eight, nine and ten.

'Charge 3. Specifications three, four, five, six, seven, nine, eleven and twenty-two, which are disapproved. And the sentence imposed by the court martial upon the defendant, Oberlin M. Carter, is hereby approved.

ELIHU ROOT, *Secretary of War.*'

'Executive Mansion,
Washington, D. C., September 29, 1899.

'Approved and confirmed.

WILLIAM MCKINLEY.'

"By direction of the Secretary of War, Captain Oberlin M. Carter, Corps of Engineers, ceases to be an officer of the army from this date, and the United States penitentiary, Fort Leavenworth, Kansas, is designated as the place for his confinement, where he will be sent by the commanding general, Department of the East, under proper guard.

"By command of Major General Miles:

H. C. CORBIN, *Adjutant General.*"

The petition averred that said Carter, in pursuance of the sentence, had been dismissed from the Army of the United States and the order of dismissal served upon him; that the crime, punishment, name and place of abode of said Carter had been published in the newspapers in and about his station and in and about the State whence he came and where he usually resided; and that said Carter had paid to the United States the fine of five thousand dollars imposed by the sentence. And that said Carter, "having been cashiered the Army, having suffered degradation, and having paid the fine imposed, as above set forth, his imprisonment and detention are contrary to law, are in violation of the Constitution of the United States, and are illegal and without warrant of law, for the following reasons, that is to say:"

First. That there was no evidence delivered before the court martial which tended to show that any crime whatever had been committed by said Carter; but, on the contrary, all the evidence taken together affirmatively showed that Carter was wholly innocent of any wrongdoing; "and that in imposing the sentence above set out said court martial acted beyond its jurisdiction, and said sentence was and is wholly void." Petitioner stated that he had no copy of the evidence, but that he attached a copy of an abstract of all the evidence adduced before the court martial.

Second. That the finding of said Carter guilty of Charge IV, and the specification thereunder, and the imposing of sentence on him as for a violation of the sixty-second article of war, were and each of them was wholly illegal and void, for that; (*a*) It was shown by the evidence, and appeared from the charges and specifications, that the two sums of money alleged to have been paid out by Carter "for a purpose not authorized by law," were paid out by him under and in accordance with the specifications of two certain contracts for the improvement of Savannah harbor and Cumberland Sound, which contracts were entered into pursuant to the act of Congress of June 3, 1896: (*b*) It appeared from the specification that the acts described therein were not in violation of the sixty-second article of war and were not cognizable by a court martial under that article, but if justiciable at all by the court martial, were justiciable under the sixtieth article of war.

Third. That the imprisonment and detention were illegal and contrary to article 102 prohibiting a second trial for the same offence, and contrary to the Fifth Amendment to the Constitution of the United States in this: (*a*) That it appeared from the charges and specifications and also from the evidence, that the payment of the two checks drawn by Carter and described in each of the specifications under which he was convicted, were the only basis of each of the four charges, and that the single act of drawing the two checks had been carved up into four distinct and different crimes, and a punishment assessed on each. (*b*) That the sentence was beyond the powers of the court martial and void, for that under the 60th article of war the court martial was authorized to inflict the punishment of a fine or imprisonment or such other punishment as it might adjudge. (*c*) That under the 61st article of war, the violation of which was laid in Charge III, the court martial had jurisdiction to inflict the judgment of dismissal from the army only. (*d*) That the facts set out in the specifications under Charges I, II and IV, respectively, brought the offense therein described under the 60th article of war, under which the court martial had jurisdiction only to inflict a fine or an imprisonment or some other punishment, in the alternative, and not cumulatively.

Fourth. That the punishment of fine and imprisonment were and each of them was beyond the power of the court martial to inflict, because the

same were imposed after Carter had ceased to be an officer of the Army of the United States, and after he had ceased to be subject to the jurisdiction of the court martial.

Fifth. That the punishment of imprisonment was beyond the powers of the court martial and void in this: That under and by virtue of an act of Congress approved September 27, 1890, the President, by an order dated March 20, 1895, fixed the maximum punishment for a violation by an enlisted man in the Army of the United States of the 60th article of war, and for the violation by such person of the 62d article of war, by embezzlement of more than one hundred dollars, at a term of four years' confinement at hard labor, under each article; and that thereafter, on October 31, 1895, (prior to these proceedings,) the President, in accordance with the act of Congress, prescribed that said maximum limit should extend to all such violations, whether by officers or enlisted men of the Army.

Sixth. That the sentence was wholly void in this—

"That said court martial found the said Captain Carter guilty of charge one and of specification two thereunder; of charge two and specifications six, seven, eight, nine and ten thereunder; of charge three and specifications two, three, four, five, six, seven, nine, eleven and twenty-two thereunder; and of charge four and specification one thereunder; and thereupon sentenced the said Carter to be punished as hereinabove set forth; but the President of the United States disapproved the findings of said court martial as to specifications seven, eight, nine and ten, under charge two, and specifications three, four, five, six, seven, nine, eleven and twenty-two, under charge three, and approved the said sentence as originally fixed by the said court; the said several specifications so approved and the said several specifications so disapproved, charging several and distinct offenses, growing out of several, distinct and disconnected transactions, said several offenses charged not being of the same class of crimes.

"That the sentence thus confirmed by the said President of the United States was not the sentence of said court martial, and was not in mitigation or commutation of such sentence, but was for the offenses of which said Carter was finally determined to be guilty, in excess of the sentence imposed by said court martial."

The petition further alleged that October 2, 1899, said Carter, by Abram J. Rose, applied to the United States Circuit Court for the Southern District of New York for a writ of *habeas corpus*, which writ was on October 20, 1899, dismissed; that on January 24, 1900, the decision of the Circuit Court was affirmed by the United States Circuit Court of Appeals for the Second Circuit; that thereafter the petitioner last named prosecuted a writ of error to the Circuit Court and a certiorari out of the Supreme Court of the United States, but the Supreme Court dismissed the appeal and writ of error. Copies of the opinions in each of these courts were attached. Petitioner further averred that this application was made on the same evidence as in the application to the Circuit Court for the Southern District of New York, to wit, the evidence adduced before the court martial.

By amendment, a further allegation was added to the petition to the effect that on December 9, 1899, said Carter and Benjamin D. Green and others were indicted in the United States Circuit Court for the Southern District of Georgia for a conspiracy to defraud the United States, a copy of which indictment was attached; "that said indictment was based on the same facts as set out in the charges and specifications, for the conviction of which by said court martial said Carter is now undergoing imprisonment—that is to say, Charge I, specification 2; Charge II, specification 6; Charge III, specification 2; and Charge IV, specification 1, as set out in the petition filed herein—and that said indictment was found after the Circuit Court of the United States for the Southern District of New York had denied the application for a writ of *habeas corpus* on October 20, 1899."

The respondent, the warden of the United States penitentiary at Fort Leavenworth, Kansas, returned to the writ that he had Oberlin M. Carter in custody, as such warden, and detained him by direction of the Secretary of War, the said Carter being under sentence of a general court martial, sentenced to be imprisoned at said penitentiary for five years, and that Carter was now in custody as aforesaid undergoing said sentence of imprisonment; that the warden was acting in the capacity of custodian of said Carter, in virtue of General Orders No. 172 of September 29, 1899, a duly authenticated copy of which was filed as part of the return; and the respondent contended that said Carter had been lawfully convicted and sentenced by the said general court martial, which had jurisdiction of the person of said Carter and of the various offenses for which he was tried.

Respondent further set forth the proceedings by *habeas corpus* in the Southern District of New York, during the pendency of which the said Carter paid the fine imposed, and averred that on hearing the Circuit Court dismissed the writ, and Carter was remanded to custody, *In re Carter*, 97 Fed. Rep. 496; that thereafter the cause was carried to the Circuit Court of Appeals for the Second Circuit, and that court affirmed the final order of the Circuit Court. 99 Fed. Rep. 498. That on February 5, 1900, a petition for certiorari was submitted to the Supreme Court of the United States, which on February 26, 1900, was denied. *Carter* v. *Roberts*, 176 U. S. 684. That on the same day the application for certiorari was denied, an appeal was taken to the Supreme Court, and a writ of error sued out, to review the order of the Circuit Court in dismissing the *habeas corpus* and remanding the said Carter; and that thereafter the Supreme Court on April 23, 1900, dismissed said appeal and writ of error for want of jurisdiction. *Carter* v. *Roberts*, 177 U. S. 496. That on the mandate issuing from the Supreme Court, April 24, 1900, to the Circuit Court, the Circuit Court, on April 25, 1900, entered judgment, and remanded Carter to the custody from which he was produced for the purpose of having the sentence

executed. Duly authenticated transcripts of these various proceedings and copies of accompanying briefs were made parts of the return.

That in accordance with the sentence Carter was received at the penitentiary on the 27th day of April, and had been there until the present date, undergoing the same.

Respondent objected in conclusion to the admission by the court of the abstract of the evidence alleged to have been taken before the court martial and made part of petitioner's petition because the record of the whole proceedings of a court martial is required by law to be reduced to writing and deposited in the office of the Judge Advocate of the Army, and this record or a copy thereof duly authenticated is the best evidence; and even if produced, would be inadmissible for the purpose for which it was sought to be introduced, as the courts in *habeas corpus* proceedings cannot examine the evidence for the purpose of determining the guilt or innocence of the party convicted; and this case presented no exception justifying departure from this rule, as General Orders No. 172 afforded all the information necessary to dispose of the case.

The record of the Circuit Court shows that the matter came on to be heard on November 23, 1900, on petitioner's "oral motion to discharge the said Oberlin M. Carter, based upon the averments of respondent's return, no evidence having been offered or considered by the court." On December 10, 1900, it was ordered by the court "that the writ of *habeas corpus* herein be discharged; and it is further ordered that the said Oberlin M. Carter be remanded to the custody of Robert W. McClaughry, warden of the United States penitentiary at Fort Leavenworth, Kansas." The opinion of the court was delivered by Hook, J., in which Thayer, Circuit Judge, concurred. 105 Fed. Rep. 614.

This appeal was then prosecuted and errors duly assigned. Errors were also specified in appellant's brief, in substance as follows:

1. That the finding of "guilty" under Charge IV and its specification was void inasmuch as the specification was wrongly laid under Article 62, because, (*a*) the money was applied to a purpose prescribed by law; (*b*) and the crime charged was not "to the prejudice of good order and military discipline;" and inasmuch as the crime charged was "mentioned in the foregoing articles of war," being covered by paragraphs 1, 4 and 9 of Article 60.

2. The finding under Article 62 being void, that the sentence is in violation of the Fifth Amendment of the Constitution, because it was greater than could be imposed for any alleged crime taken singly, and there were only two separate crimes charged, viz., conspiracy and paying fraudulent claims, while there were three several penalties imposed, viz., dismissal, fine and imprisonment. Dismissal and fine had been discharged, and the third, imprisonment, is illegal.

3. That the entire sentence is illegal and void because the President having disapproved the conviction as to certain offenses and having ordered the original sentence to stand, such sentence ceased to be the sentence of the court martial.

4. The imprisonment is illegal because inflicted after Carter ceased to be an officer of the Army.

5. The sentence of imprisonment is void because in excess of the maximum allowed by law.

6. The court martial had no jurisdiction to try Carter "because it stands admitted that no evidence whatever was adduced tending to show his guilt."

Mr. Chief Justice FULLER delivered the opinion of the Court:

In *Carter* v. *Roberts*, 177 U. S. 496, it was said: "The eighth section of article I of the Constitution provides that the Congress shall have power 'to make rules for the government and regulation of the land and naval forces,' and in the exercise of that power Congress has enacted rules for the regulation of the army known as the Articles of War. Rev. Stat. §1342. Every officer, before he enters on the duties of his office, subscribes to these articles, and places himself within the power of courts martial to pass on any offense which he may have committed in contravention of them. Courts martial are lawful tribunals, with authority to finally determine any case over which they have jurisdiction, and their proceedings, when confirmed as provided, are not open to review by the civil tribunals, except for the purpose of ascertaining whether the military court had jurisdiction of the person and subject matter, and whether, though having such jurisdiction, it had exceeded its powers in the sentence pronounced."

Jurisdiction over the person is conceded, but it is argued that there was no jurisdiction over the subject matter because the evidence affirmatively showed that no crime whatever had been committed. Whether the sentence of a military court, approved by the reviewing authority, is open to attack in the civil courts on such a ground, is a question which does not arise on this record. The motion to discharge conceded the return to be true, and if the return showed sufficient cause for detention, the Circuit Court was right in dismissing the writ, and its final order to that effect must be affirmed. No evidence was adduced in or considered by the Circuit Court, and none is before us, nor is any inquiry into the innocence or guilt of the accused permissible.

Was then the sentence void for want of power to pronounce and enforce it?

The particular ground on which the appeal directly to this court may be rested is that the case involved the construction or application of the Con-

stitution in the contention that by the sentence petitioner was twice punished for the same offense.

That question was put forward in the petition and manifestly argued on the return. The Circuit Court states, in its opinion, that "it is contended in behalf of Carter that his imprisonment is in violation of the Constitution of the United States, and is otherwise illegal and without warrant of law." And, indeed, the application of the Constitution would seem to be necessarily involved if the sentence were held invalid on other grounds.

Holding the case to be properly before us, it will be more convenient to examine the constitutional point specially raised, after we have considered some of the other objections to the sentence.

One of these objections is that the sentence exceeded the maximum punishment fixed by the President, under the act of Congress approved September 21, 1890, (26 Stat 491, c. 998,) because the term of imprisonment imposed was five instead of four years.

That act provides that "whenever by any of the articles of war for the government of the Army the punishment on conviction of any military offense is left to the discretion of the court martial the punishment therefor shall not, in time of peace, be in excess of a limit which the President may prescribe."

February 26, 1891, the President made an executive order in limitation of punishment, which was promulgated to the Army in General Orders No. 21, February 27, 1891, and therein it was said: "In accordance with an act of Congress of September 27, 1890, the following limits to the punishment of enlisted men, together with the accompanying regulations, are established for the government in time of peace for all courts martial and will take effect thirty days after this order." This executive order was amended by the President March 20, 1895, and again amended March 30, 1898, and in 1901. In neither of these executive orders were its provisions extended to commissioned officers, and they solely related to the cases of enlisted men. It is true that clause 938 of the army regulations promulgated October 31, 1895 provides: "Whenever by any of the articles of war punishment is left to the discretion of the court, it shall not, in time of peace, be in excess of a limit which the President may prescribe. The limits so prescribed are set forth in the Manual for Courts Martial, published by authority of the Secretary of War." But we do not find in the Manual any attempt to extend the limitations to others than enlisted men; and it is evident that a limit on discretion in punishment to be imposed by the President only can only have such operation as he may affirmatively prescribe.

It is further urged that the punishments of fine and imprisonment were illegal because inflicted after Captain Carter had ceased to be an officer of the Army.

The different provisions of the sentence took effect concurrently while the accused was under the control of the military authorities of the United States as a commissioned officer of the Army. The date of the order of dismissal, of the infliction of the fine and of the beginning of the imprisonment were the same date.

The accused was proceeded against as an officer of the army, and jurisdiction attached in respect of him as such, which included not only the power to hear and determine the case, but the power to execute and enforce the sentence of the law. Having been sentenced, his status was that of a military prisoner held by the authority of the United States as an offender against its laws.

He was a military prisoner though he had ceased to be a soldier; and for offenses committed during his confinement he was liable to trial and punishment by court martial under the rules and articles of war. Rev. Stat. § 1361.

It may be added that the principle that where jurisdiction has attached it cannot be divested by mere subsequent change of status has been applied as justifying the trial and sentence of an enlisted man after expiration of the term of enlistment, *Barret* v. *Hopkins*, 7 Fed. Rep. 312; and the execution of sentence after the lapse of many years and the severance of all connection with the Army. *Coleman* v. *Tennessee*, 97 U. S. 509.

In the latter case this court held, at October term, 1878, that a soldier who had been convicted of murder and sentenced to death by a general court martial in 1865, but whose sentence had not been executed, might "be delivered up to the military authorities of the United States, to be dealt with as required by law." In this matter it was subsequently advised by Attorney General Devens that the death sentence might legally be carried into effect notwithstanding the fact that the soldier had in the meantime been discharged from the service, under the circumstances detailed, but he recommended that the sentence be commuted, and this recommendation was followed. 16 Op. Att. Gen. 349.

In *Ex parte Mason*, 105 U. S. 696, where the accused was sentenced by a general court martial to dishonorable discharge, forfeiture of pay, and eight years' imprisonment in the Albany penitentiary, an application for release on *habeas corpus* was denied, and the sentence held to be legal.

Another objection strenuously insisted on is that the sentence ceased to be the sentence of the court martial because of the disapproval of certain specifications by the President.

The 65th article of those enacted by Congress, April 10, 1806, (2 Stat. 359, c. 20,) provided: "But no sentence of a court martial shall be carried into execution until after the whole proceedings shall have been laid before the officer ordering the same, or the officer commanding the troops for the

time being." In the Revised Statutes this part of the 65th article of war was made section 104, and read: "No sentence of a court martial shall be carried into execution until the whole proceedings shall have been approved by the officer ordering the court, or by the officer commanding for the time being." By the act of July 27, 1892 (27 Stat. 277, c. 272,) the 104th section was amended so as to read: "No sentence of a court martial shall be carried into execution until the same shall have been approved by the officer ordering the court, or by the officer commanding for the time being."

The original article required *the whole proceedings to be laid* before the reviewing authority; the Revised Statutes, that *the whole proceedings should be approved;* the act of July 27, 1892, that *the sentence* should not be carried into execution until *it was approved.* From this legislation it appears that the approval of the sentence and not of the whole proceedings is now the prerequisite to carrying the sentence into execution, and this is in harmony with articles 105, 106, 107 and 108.

In *Claassen* v. *United States*, 142 U. S. 140, 146, it was said: "In criminal cases, the general rule, as stated by Lord Mansfield before the Declaration of Independence, is 'that if there is any one count to support the verdict, it shall stand good, notwithstanding all the rest are bad.' *Peake* v. *Oldham*, Cowper, 275, 276; *Rex* v. *Benfield*, 2 Bur. 980, 985. See also *Grant* v. *Astle*, 2 Doug. 722, 730. And it is settled law in this court, and in this country generally, that in any criminal case a general verdict and judgment on an indictment or information containing several counts cannot be reversed on error, if any one of the counts is good and warrants the judgment, because, in the absence of anything in the record to show the contrary, the presumption of law is that the court awarded sentence on the good count only."

In *Ballew* v. *United States*, 160 U. S. 187, where the indictment embraced two counts, each setting up a distinct offense, the court instructed the jury that if they considered the defendant guilty on one count and innocent on the other, they should so find; and that if they found him guilty on both counts, that they should return a general verdict of guilty. A general verdict of guilty was returned, and judgment rendered thereon. This court held that error had been committed in the conviction as to the first count but none in the conviction upon the other, and as the general verdict covered both, the judgment was reversed under the statute in that behalf and the cause remanded with instructions to enter judgment on the second count.

In *Putnam* v. *United States*, 162 U. S. 687, where there was a conviction on two counts and the sentence imposed was distinct and separate as to each count, but was made concurrent so that the entire amount of punishment imposed would be undergone if the judgment were sustained

under either count, error being found in the conviction as to one of them, the judgment was reversed as to that count and affirmed on the other.

We are dealing here with no matter of insufficient counts or of conviction of two offenses, sustainable only as to one, but the analogies of the criminal law bear out the procedure under the military law, the rules of which determine the present contention.

That contention, after all, amounts to no more than to say that if the court martial had acquitted on the disapproved findings, it must be assumed that the sentence would have been less severe, and therefore that the President should have sent the case back or mitigated the punishment, and that because he did not, the punishment must be conclusively regarded as increased. This is wholly inadmissible when the powers vested in the ultimate tribunal are considered.

The court-martial for the trial of Captain Oberlin M. Carter was convened by orders issued by the President; and he was therefore the reviewing authority, and the court of last resort.

The law governing courts martial is found in the statutory enactments of Congress, particularly the Articles of War; in the Army Regulations; and in the customary military law. According to military usage and practice, the charge is in effect divided into two parts, the first technically called the "charge," and the second, the "specification." The charge proper designates the military offense of which the accused is alleged to be guilty. The specification sets forth the acts or omissions of the accused which form the legal constituents of the offense. The pleading need not possess the technical nicety of indictments as at common law. "Trials by courts martial are governed by the nature of the service, which demands intelligible precision of language and regards the substance of things rather than their form." 7 Op. Atty. Gen. 604. Not only do military usage and procedure permit of an indefinite number of offenses being charged and adjudicated together in one and the same proceeding, but the rule is recognized that whenever an officer has been apparently guilty of several or many offenses, whether of a similar character or distinct in their nature, charges and specifications covering them all should, if practicable, be preferred together, and together brought to trial. 1 Winthrop, 219; 22 Op. Atty. Gen. 595. And it has been repeatedly ruled by the Judges Advocate General that "a duly approved finding of guilty on one of several charges, a conviction upon which requires or authorizes the sentence adjudged, will give validity and effect to such sentence, although the similar findings on all the other charges are disapproved as not warranted by the testimony." Dig. Op. Judge Advocate General, ed. 1895, p. 696; Id. ed. 1868, pp. 343, 350.

The sentence against Captain Carter was rendered on findings of guilty of four charges and certain specifications thereunder.

It devolved on the President to approve or to disapprove the sentence. Before taking action, he referred the proceedings to the Attorney General, who submitted a careful report thereon, and recommended the disapproval of certain findings. 22 Op. 589. These related to facts of less gravity under Charges I and II than the others set up thereunder, and those under Charge III thought objectionable were not material, as dismissal was the sole punishment under that charge. The President disapproved of the findings of guilty of some of the specifications under two of the charges, and approved findings of guilty of a specification or specifications under each of the charges, and of the findings of guilty of all of the charges, and approved the sentence. He might have referred the proceedings back to the court for revision, but he was not required to do so, if in his opinion this was not necessary, and the sentence was justified by the findings which he did approve. As President he might have exercised his constitutional power to pardon, or as the reviewing authority he might have pardoned or mitigated the punishment adjudged except that of dismissal, although he had no power to add to the punishment. He did not think it proper to remand, to mitigate or to pardon. He clearly acted within his authority whether the Articles of War, the Army Regulations, or the unwritten or customary military law be considered, and the judgment he rendered cannot be disturbed on the ground suggested.

We are brought then to consider the two propositions on which much of the stress of the argument was laid.

First. That the finding of guilty of charge 4 and its specification was beyond the powers of the court martial;

Second. That if that finding were void, then that the sentence was in violation of the Fifth Amendment to the Constitution.

Charge I was: "Conspiring to defraud the United States, in violation of the 60th article of war." Charge II was: "Causing false and fraudulent claims to be made against the United States, in violation of the 60th article of war."

Charge III was: "Conduct unbecoming an officer and a gentleman, in violation of the 61st article of war." Charge IV was: "Embezzlement, as defined in section 5488 of the Revised Statutes, in violation of the 62d article of war."

If Charge IV be laid out of view, let us see if the sentence was void because in violation of the Fifth Amendment.

That amendment declares: "Nor shall any person be subjected for the same offense to be twice put in jeopardy of life or limb."

The Government objects in the outset that the Fifth Amendment is not applicable in proceedings by court martial, and that the question could only be raised under the 102d article of war, which reads: "No person shall be tried a second time for the same offense," and that, moreover, the point

was not raised in the court martial that proceeding to judgment under these three charges would be either in violation of the 102d article of war, or of the Fifth Amendment, and comes too late on application for *habeas corpus.* And further, that the question was one within the power of the court martial to decide, and must be held to have been waived, or be assumed to have been ruled against the accused, in which case the decision would be conclusive on *habeas corpus,* since if incorrect it would be merely error, and would not go to the jurisdiction.

In *In re Belt, Petitioner,* 159 U. S. 95, we held that the Supreme Court of the District of Columbia had jurisdiction and authority to determine the validity of an act which authorized the waiver of a jury, and to dispose of the question as to whether the record of a conviction before a judge without a jury, where the prisoner waived trial by jury according to statute, was legitimate proof of a first offense, and that, this being so, this court could not review the action of that court, and the Court of Appeals, in this particular on *habeas corpus.*

The case of *Ex parte Bigelow* was referred to and quoted from thus: "In *Ex parte Bigelow,* 113 U. S. 328, 330, which was a motion for leave to file a petition for *habeas corpus,* the petitioner had been convicted and sentenced in the Supreme Court of the District to imprisonment for five years under an indictment for embezzlement. It appeared that there were pending before that court fourteen indictments against the petitioner for embezzlement, and an order of the court had directed that they be consolidated under the statute and tried together. A jury was empanelled and sworn, and the district attorney had made his opening statement to the jury, when the court took a recess, and upon reconvening a short time afterwards, the court decided that the indictments could not be well tried together, and directed the jury to be discharged from the further consideration of them, and rescinded the order of consolidation. The prisoner was thereupon tried before the same jury on one of the indictments and found guilty. All of this was against his protest and without his consent. The judgment on the verdict was taken by appeal to the Supreme Court of the District in general term, where it was affirmed. It was argued here, as it was in the court in general term, that the empanelling and swearing of the jury and the statement of his case by the district attorney put the prisoner in jeopardy in respect of all the offenses charged in the consolidated indictment, within the meaning of the Fifth Amendment, so that he could not be again tried for any of these offenses, and Mr. Justice Miller, delivering the opinion of the court, after remarking that if the court of the District was without authority in the matter, this court would have power to discharge the prisoner from confinement, said: 'But that court had jurisdiction of the offense described in the indictment on which

the prisoner was tried. It had jurisdiction of the prisoner, who was properly brought before the court. It had jurisdiction to hear the charge and the evidence against the prisoner. It had jurisdiction to hear and to decide upon the defenses offered by him. The matter now presented was one of those defenses. Whether it was a sufficient defense was a matter of law on which that court must pass so far as it was purely a question of law, and on which the jury under the instructions of the court must pass if we can suppose any of the facts were such as required submission to the jury. If the question had been one of former acquittal—a much stronger case than this—the court would have had jurisdiction to decide upon the record whether there had been a former acquittal for the same offense, and if the identity of the offense were in dispute, it might be necessary on such a plea to submit that question to the jury on the issue raised by the plea. The same principle would apply to a plea of a former conviction. Clearly in these cases the court not only has jurisdiction to try and decide the question raised, but it is its imperative duty to do so. If the court makes a mistake on such trial it is error which may be corrected by the usual modes of correcting such errors, but that the court had jurisdiction to decide upon the matter raised by the plea both as matter of law and of fact cannot be doubted. . . . It may be confessed that it is not always very easy to determine what matters go to the jurisdiction of a court so as to make its action when erroneous a nullity. But the general rule is that when the court has jurisdiction by law of the offense charged, and of the party who is so charged, its judgments are not nullities.' And the application was denied."

It is difficult to see why the sentences of courts martial, courts authorized by law in the enforcement of a system of government for a separate community recognized by the Constitution, are not within this rule. Its application would seem to be essential to the maintenance of that discipline which renders the Army efficient in war and morally progressive in peace, and which is secured by the military code and the decisions of the military courts.

Reserving, however, the determination of these questions, it is nevertheless clear that the system under which the accused was tried, and his status as an officer of the Army, must be borne in mind in deciding whether the amendment, if applicable, was or was not violated by this sentence.

The contention is that Captain Carter was twice put in jeopardy because the sentence was greater than the court martial had jurisdiction to inflict on conviction of any one of the offenses charged, taken singly, and because the offenses charged were the same within the meaning of the constitutional provision.

Articles 60 and 61 are as follows:

"ART. 60. Any person in the military service of the United States who makes or causes to be made any claim against the United States, or an officer thereof, knowing such claim to be false or fraudulent; or

"Who presents or causes to be presented to any person in the civil or military service thereof, for approval or payment, any claim against the United States or any officer thereof, knowing such claim to be false or fraudulent; or

"Who enters into any agreement or conspiracy to defraud the United States by obtaining, or aiding others to obtain, the allowance or payment of any false or fraudulent claim; or

"Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or against any officer thereof, makes or uses, or procures or advises the making or use of, any writing, or other paper, knowing the same to contain any false or fraudulent statement; or

"Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States, for any officer thereof, makes, or procures or advises the making of, any oath to any fact or to any writing or other paper, knowing such oath to be false; or

"Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States for any officer thereof, forges or counterfeits, or procures or advises the forging or counterfeiting of, any signature upon any writing or other paper, or uses, or procures or advises the use of, any such signature, knowing the same to be forged or counterfeited; or

"Who, having charge, possession, custody or control of any money or other property of the United States, furnished or intended for the military service thereof, knowingly delivers, or causes to be delivered, to any person having authority to receive the same, any amount thereof less than that for which he receives a certificate or receipt; or

"Who, being authorized to make or deliver any paper certifying the receipt of any property of the United States, furnished or intended for the military service thereof, makes, or delivers to any person, such writing, without having full knowledge of the truth of the statements therein contained, and with intent to defraud the United States; or

"Who steals, embezzles, knowingly and wilfully misappropriates, applies to his own use or benefit, or wrongfully or knowingly sells or disposes of any ordnance, arms, equipments, ammunition, clothing, subsistence stores, money, or other property of the United States, furnished or intended for the military service thereof; or

"Who knowingly purchases, or receives in pledge for any obligation or indebtedness, from any soldier, officer, or other person who is a part of or employed in said forces or service, any ordnance, arms, equipments, ammunition, clothing, subsistence stores, or other property of the United States, such soldier, officer, or other person not having lawful right to sell or pledge the same,

"Shall, on conviction thereof, be punished by fine or imprisonment, or by such other punishment as a court martial may adjudge. And if any person, being guilty of any of the offenses aforesaid, while in the military

service of the United States, receives his discharge, or is dismissed from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court martial, in the same manner and to the same extent as if he had not received such discharge nor been dismissed.

"ART. 61. Any officer who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service."

It is said that the punishment must be imposed under either the 60th or the 61st articles, or under both; that the only penalty under the 61st article is dismissal; that the punishment under the 60th article may be "fine *or* imprisonment, or such other punishment as a court martial may adjudge," and that this is in the alternative and cannot be cumulative.

That that is the necessary construction is not to be conceded. Offenses under this article may be of greater or less gravity, and the necessity for the exercise of discretion is obvious. Conviction in some cases might deserve the punishment of fine, or of imprisonment, or of both, as well as of dismissal in addition to either or both; in others lesser penalties might suffice. The word "or" was properly used to give play to discretion. This is the view expressed in Winthrop, vol. 2, p. 1101.

The 60th article was taken from sections 1 and 2 of the act of March 2, 1863, (12 Stat. 696, c. 67,) "to prevent and punish frauds upon the Government of the United States," brought forward in the Revised Statutes as § 5438, and that act provided that any person in the military service, if found guilty, "shall be punished by fine *and* imprisonment, or such other punishment as the court martial shall adjudge, save the punishment of death," while a person in civil life guilty of the offense was punishable under section 3 "by imprisonment not less than one nor more than five years, *or* by fine of not less than one thousand dollars and not more than five thousand dollars;" but when the military offense was transferred to the military code, the word "and" was changed to the word "or." Hence, it is argued, that Congress thereby indicated that it intended to confine the punishment to either fine *or* imprisonment. We do not think this is necessarily so. The punishment of persons not in the military or naval service (in addition to a pecuniary forfeiture and double damages) was fixed at fine or imprisonment, and no other. The punishment of persons in the military service was fixed at fine and imprisonment, or such other punishment as the court martial might adjudge. The change of the word "and" to "or" tended to obviate controversy as to the range of discretion.

But suppose this otherwise, still it does not follow that a fine might not be inflicted for the commission of one of the offenses enumerated in article 60, and imprisonment for the commission of another.

The penalty denounced by Article 60 that the accused, on conviction, "may be punished by fine or imprisonment or such other punishment as a court martial may adjudge," is plainly to be taken distributively, and is applicable on conviction of either of the offenses enumerated.

We understand the rule established by military usage to be "that the sentence of a court martial shall be, in every case, an *entirety;* that is to say, that there shall be but a single sentence covering all the convictions on all the charges and specifications upon which the accused is found guilty, however separate and distinct may be the different offenses found, and however different may be the punishments called for by the offenses." 1 Winthrop, (2d ed.) 614.

Where then there is conviction of several offenses, the sentence is warranted to the extent that such offenses are punishable.

This was so ruled by the Circuit Court of Appeals for the Second Circuit in *Rose ex rel. Carter* v. *Roberts*, 99 Fed. Rep. 948, and Wallace, J., speaking for the court, said: "As has been stated, the relator was convicted of two of the offenses defined by the sixtieth article of war. The record presents the charges and specifications upon which he was found guilty of those offenses. The charges describe each offense in the language of the article. Whether the specifications support the charges or the evidence supports the specifications, we are not at liberty to consider. Nor is it open to inquiry whether the two offenses were in fact but one and the same criminal act. When properly constituted and convened, a court martial has jurisdiction to hear and determine the question whether the accused is guilty of any of the offenses created by the articles of war. This jurisdiction necessarily includes the authority to decide, when the charge preferred against the accused is the commission of one or more of these offenses, whether the specifications and the evidence sufficiently exhibit the incriminating facts. As was said by the Supreme Court in *Dynes* v. *Hoover*, 20 How. 65, the sentence, when confirmed by the President, 'is altogether beyond the jurisdiction or inquiry of any civil tribunal whatever, unless it shall be in a case in which the court had no jurisdiction over the subject matter or charge, or one in which, having jurisdiction over the subject, it has failed to observe the rules prescribed by statute for its exercise.' Having found the relator to be guilty of two offenses, the court was empowered by the statute to punish him as to one by fine and as to the other by imprisonment. The sentence was not in excess of its authority."

Cumulative sentences are not cumulative punishments, and a single sentence for several offenses, in excess of that prescribed for one offense, may be authorized by statute. *In re De Bara*, 179 U. S. 316; *In re Henry*, 123 U. S. 372.

The offenses charged under this article were not one and the same offense. This is apparent if the test of the identity of offenses that the same evidence is required to sustain them be applied. The first charge alleged "a conspiracy to defraud," and the second charge alleged "causing false and fraudulent claims to be made," which were separate and distinct offenses, one requiring certain evidence which the other did

not. The fact that both charges related to and grew out of one transaction made no difference.

In *Morey* v. *Commonwealth,* 108 Mass, 433 the Supreme Judicial Court of Massachusetts, speaking through Mr. Justice Gray, then a member of that tribunal, held: "A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other. The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other."

The sentence, then, of fine and imprisonment was justified by the convictions of the first and second charges.

Finally, it is contended on this branch of the case that the offense under Charge III is the same offense as those under Charges I and II, called by a different name, and hence that the punishment of dismissal was illegal because a third punishment where but two offenses were committed.

As heretofore said, dismissal might have been added to fine and imprisonment as part of the punishment, for either or both of the offenses, under the first and second charges.

But the offense of conduct unbecoming an officer and a gentleman is not the same offense as conspiracy to defraud, or the causing of false and fraudulent claims to be made, although to be guilty of the latter involves being guilty of the former.

Article 61 prescribes that "any officer who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service," and Article 100, that "when an officer is dismissed from the service for cowardice or fraud, the sentence shall further direct that the crime, punishment, name and place of birth of the delinquent shall be published in the newspapers in and about the camp, and in the State from which the offender came, or where he usually resides."

Article 97 is: "No person in the military service shall, under the sentence of a court martial, be punished by confinement in a penitentiary, unless the offense of which he may be convicted would, by some statute of the United States, or by some statute of the State, Territory, or District in which such offense may be committed, or by the common law, as the same exists in such State, Territory, or District, subject such convict to such punishment."

Confinement at hard labor in a penitentiary is prescribed by sections 5438 and 5488 of the Revised Statutes, section 5438 having been

brought forward from the act of March 2, 1863, from which the 60th article was taken. (And see § 5442 R. S.; Act March 31, 1895, 28 Stat. 957.)

Conviction of Charges I and II was conviction of fraud, and Article 100 contemplates that the officer may be dismissed under Article 60 or under Article 61. Conviction of fraud under Article 60 plainly involves conviction under Article 61; and dismissal is as mandatory as degradation.

The contention that an officer convicted of crimes punishable in the penitentiary under Articles 60 and 97 cannot be so punished if he be also dismissed, or cannot be dismissed if he be so punished, is too unreasonable to be countenanced.

The result is that we are of opinion that the sentence cannot be invalidated on any of the grounds so far considered.

The fourth charge was: "Embezzlement, as defined in section 5488, Revised Statutes of the United States, in violation of the 62d article of war."

Section 5488 reads: "Every disbursing officer of the United States who deposits any public money entrusted to him in any place or in any manner, except as authorized by law, or converts it to his own use in any way whatever, or loans with or without interest, or for any purpose not prescribed by law withdraws from the treasurer or any assistant treasurer, or any authorized depository, or for any purpose not prescribed by law transfers or applies any portion of the public money intrusted to him, is, in every such act deemed guilty of an embezzlement of the money so deposited, converted, loaned, withdrawn, transferred, or applied; and shall be punished by imprisonment with hard labor for a term not less than one year nor more than ten years, or by a fine of not more than the amount embezzled or less than one thousand dollars, or by both such fine and imprisonment."

Article 62 is:

"ART. 62. All crimes not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing Articles of War, are to be taken cognizance of by a general, or a regimental, garrison, or field officers' court martial, according to the nature and degree of the offense, and punished at the discretion of such court."

The construction would not be unreasonable if it were held that the words "though not mentioned in the foregoing articles of war" meant "notwithstanding they are not mentioned," and that the article was intended to cover *all* crimes, whether previously enumerated or not. The reference is to crimes created or made punishable by the common law or by the statutes of the United States, when directly prejudicial to good order and military discipline. Our attention has not been called to any former

adjudication of the particular point by the military courts, but we think it would be going much too far to say that, if a court martial so construed the words, and sentenced for a crime previously mentioned, the sentence, when made his own by the President, would be absolutely void.

Colonel Winthrop says, however, that "the construction of these words has uniformly been that they are words of limitation, restricting the application of the article to offenses not named or included in the articles preceding; the policy of the provision being, as it is expressed by Samuel, 'to provide a general remedy for wrongs not elsewhere provided for.'" Vol. 2, p. 1126.

Accepting this construction, we are nevertheless of opinion that the specified crime was not "mentioned in the foregoing articles."

The first and fourth subdivisions of the 60th article of war provide that "any person in the military service of the United States who makes or causes to be made any claim against the United States, or any officer thereof, knowing such claim to be false or fraudulent," or "who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance or payment of any claim against the United States or against any officer thereof, makes or uses, or procures or advises the making or use of, any writing, or other paper, knowing the same to contain any false or fraudulent statement," shall, on conviction, be punished.

The specification under Charge IV alleged that the accused, as a disbursing officer of the United States, applied to a purpose not prescribed by law large sums of public money intrusted to him, for river and harbor purposes, by causing them to be paid out by checks on false accounts, the payment being accomplished by the drawing and delivery of the checks directing payment to be made of moneys of the United States, and thus withdrew by means of checks, from the authorized depository, moneys for an unauthorized purpose, and applied them to unlawful purposes. The application, coupled with the payment and withdrawal of the funds by checks, constituted the embezzlement defined in section 5488, while the specific acts set forth in subdivisions one and four of the 60th article were distinct from the acts prohibited by section 5488. By the charge, the particular offense was laid in general terms, and by the specification the facts constituting the offense charged were stated. The specification here set forth abstraction by fraudulent means of $230,749.90, and $345,000, moneys of the United States intrusted to the accused as a disbursing officer of the Government, but it was none the less *malum prohibitum* because it was also *malum in se*.

Nor are we persuaded by the ingenious argument of appellant's counsel that the crime alleged in this charge was covered by subdivision 9 of Article 60, because it was embezzlement of money "furnished or intended for the military service," § 5488 relating to the improper disposition of

any public money. That subdivision denounces punishment on any person in the military service of the United States "who steals, embezzles, knowingly and wilfully misappropriates, applies to his own use or benefit, or wrongfully or knowingly sells or disposes of any ordnance, arms, equipments, ammunition, clothing, subsistence stores, money, or other property of the United States, furnished or intended for the military service thereof." Most of these enumerated classes of property are obviously military stores used for military purposes, and on the principle of *noscitur a sociis* all the classes designated fall into the same category. And this seems to be put beyond question by the words "furnished or intended for the military service thereof." The military service as used in this connection means the land forces or the Army. The fact that money appropriated for river and harbor improvements is disbursed by an officer of the Army and the work supervised by the engineer force in the service of the government, does not make the moneys so appropriated moneys "furnished or intended for the military service," as the words are used in paragraph nine. This was the view of Lacombe, J., in holding the sentence supported by the conviction of the fourth charge. 97 Fed. Rep. 496. The Circuit Court of Appeals, without questioning the correctness of that conclusion, did not consider the question, because it sustained the sentence under the conviction of the first and second charges. The Circuit Court for the District of Kansas concurred in the conclusions of each of the other courts. We are of opinion that officers of the Army are in the eye of the law on military duty, although employed as such officers under statutes of the United States in the public service on duties not in themselves pertaining to the Army, and that the moneys disbursed by them when so employed do not because they are such officers become money furnished and intended for the military service.

Illustrations are found in the administration of appropriations for the Indian service, the Light House service, superintending the Washington aqueduct, maintaining the public grounds about the White House, and the like.

The appropriations made for river and harbor improvements are *per se* for the benefit of commerce and navigation, and not for military or naval purposes, and the money is furnished and intended for public works in aid of commerce. In the exercise of the power to regulate commerce, Congress has repeatedly legislated in regard to the construction of river and harbor improvements in the navigable waters of the United States, and enacted rules in relation thereto. The money made the subject of the embezzlement in this case was appropriated to be expended under the War Department by the act of Congress of June 3, 1896, (29 Stat. 202, c. 314,) entitled "An act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes," and the

act of June 4, 1897, (30 Stat. 11, 44, c. 2,) entitled "An act making appropriations for sundry civil expenses of the government for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, and for other purposes."

The status of Captain Carter was not changed by his detail to the charge of these improvements, and he was still subject to the military jurisdiction.

It is further argued that the specification was wrongly laid under Article sixty-two, because "the money was applied to a purpose prescribed by law," and "the crime charged 'was not to the prejudice of good order and military discipline,'" but the contention is without merit.

The fact that the vouchers purported to be issued as against the appropriations for the improvement of the Savannah River and of Cumberland Sound, if these vouchers were false and falsely certified to, and if the accounts on which the moneys were paid were false, "the moneys not being due or owing from the United States to the parties paid or to any one else, and he, the said Captain Carter, well knowing this to be the case," as stated in the specification, could not make the application of the money by that payment an application to a purpose prescribed by law.

We should suppose that embezzlement would be detrimental to the service within the intent and meaning of the article, but it is enough that it was peculiarly for the court martial to determine whether the crime charged was "to the prejudice of good order and military discipline." *Swaim* v. *United States*, 165 U. S. 553; *Smith* v. *Whitney*, 116 U. S. 178; *United States* v. *Fletcher*, 148 U. S. 84.

In *Swaim* v. *United States*, which involved a sentence under the 62d article of war, Mr. Justice Shiras, delivering the opinion, said: "But, as the authorities heretofore cited show, this is the very matter that falls within the province of courts martial, and in respect of which their conclusions cannot be controlled or reviewed by the civil courts. As was said in *Smith* v. *Whitney*, 116 U. S. 178, 'of questions not depending upon the construction of the statutes, but upon unwritten military law or usage, within the jurisdiction of courts martial, military or naval officers, from their training and experience in the service, are more competent judges than the courts of common law. . . . Under every system of military law for the government of either land or naval forces, the jurisdiction of courts martial extends to the trial and punishment of acts of military or naval officers which tend to bring disgrace and reproach upon the service of which they are members, whether those acts are done in the performance of military duties, or in a civil position, or in a social relation, or in private business.'"

The case has been argued with zeal and ability, and it has received the consideration which its importance demanded. If these observations have been extended beyond what was strictly required, that should at least serve

to show that no material suggestion bearing on the disposal of this appeal has escaped attention.

But we must not be understood by anything we have said as intending in the slightest degree to impair the salutary rule that the sentences of courts martial, when affirmed by the military tribunal of last resort, cannot be revised by the civil courts save only when void because of an absolute want of power, and not merely voidable because of the defective exercise of power possessed.

Order affirmed.

Mr. Justice HARLAN did not hear the argument and took no part in the consideration and disposition of the case.

True copy.

Test:

Clerk Supreme Court, U. S.